Supreme Court, U.S.
FILED
06-734 NOV 22 2006
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

CAB PRODUKTTECHNIK GMBH & CO. KG,
Petitioner,

v.

THARO SYSTEMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JON P. YORMICK
NICHOLAS A. PANAGOPOULOS II
YORMICK & ASSOCIATES CO., LPA
KEY TOWER - 52ND FLOOR
127 PUBLIC SQUARE
CLEVELAND, OH 44114
(216) 928-3474

JOHN B. NALBANDIAN
Counsel of Record
TAFT, STETTINIUS
& HOLLISTER LLP
425 WALNUT STREET
SUITE 1800
CINCINNATI, OH 45202
(513) 381-2838

PETER M. POULOS
TAFT, STETTINIUS & HOLLISTER LLP
200 PUBLIC SQUARE, 3500 BP TOWER
CLEVELAND, OH 44114
(216) 241-2838

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether a court, in evaluating the "reasonableness" of personal jurisdiction under the Due Process Clause of the 14th Amendment and this Court's decisions in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), may apply a presumption in favor of the reasonableness of the exercise of jurisdiction where minimum contacts are present.

2. Whether a trial court's *post-hoc* and post-admission findings with respect to the admissibility of proposed expert testimony are relevant to whether the court has satisfied its pre-admission gatekeeping obligation under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were petitioner cab Produkttechnik GmbH & Co. K.G. ("cab") and respondent Tharo Systems, Inc. ("Tharo"). No other party appeared in any proceedings below.

Pursuant to Supreme Court Rule 29.6, petitioner states that it is a private company with no parent companies and no publicly held company owns any of its stock.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

Statement of Facts 3

1. Underlying Dispute 3

2. Pre-Trial and Trial 5

3. Post-Trial 8

4. The Sixth Circuit's Decision 8

Reasons for Granting the Writ 9

I. The Courts of Appeals and State Courts Are Divided On How To Implement This Court's Reasonableness Due Process Requirement For The Exercise of Personal Jurisdiction 9

A. This Court's Precedent Requires a Meaningful Five-Factor Reasonableness Analysis in Personal Jurisdiction Cases 10

B. By Employing a Presumption in Favor of Reasonableness, the Court of Appeals Decision Conflicts with the Decisions of Other Courts of Appeals 13

C. The Exercise Of Jurisdiction in This Case Is Clearly Unreasonable Under a Meaningful Reasonableness Inquiry 17

1. Burden on the defendant 17

2. Interests of the forum state 18

3. Plaintiff's interest in obtaining relief . . . 18

4 & 5. Interstate judicial system's interest in obtaining the most efficient resolution of controversies and

Shared interest of the several States in furthering fundamental substantive social policies 19

D. This Issue Is Important and Recurring 20

II. The Decision Below Conflicts With The Decisions Of Other Courts of Appeals By Examining the District Court's *Post-Hoc* Findings To Determine Whether It Satisfied Its *Daubert* "Gatekeeping" Function 21

A. The Courts of Appeals Are in Conflict on Whether a Trial Court's Post-Trial Findings Are Relevant to Whether it Properly Exercised its *Daubert* "Gatekeeping" Function 22

B. This Is an Important and Recurring Issue . . . 28

Conclusion 28

Appendix

Appendix A - Sixth Circuit Opinon Dated 8/24/06 . . . . . 1a

Appendix B - District Court Judgment Entry Dated 6/1/05 . . . . . 26a

Appendix C - District Court Memorandum and Order Denying Defendant's Motion to Dismiss for Lack of Personal Jurisdiction 28a

TABLE OF AUTHORITIES

Cases

Asahi Metal Ind. Co. v. Superior Court,
480 U.S. 102 (1987) . . . . . *passim*

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 10, 11, 12, 16, 17

Core-Vent Corp. v. Nobel Indus. AB,
11 F.3d 1482 (9th Cir. 1993) 14

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993) . . . . . *passim*

Dodge v. Cotter Corp.,
328 F.3d 1212 (10th Cir. 2003) 24, 25, 26, 27

Drake v. Delta Air Lines, Inc., No. 94-CV-9544,
2005 WL 1743816 (E.D.N.Y. July 21, 2005) . . 24-25

Elcock v. Kmart Corp.,
233 F.3d 734 (3d Cir. 2000) 22

Ellicott Machine Corp. v. John Holland Party Ltd.,
995 F.2d 474 (4th Cir. 1993) 15

Fields v. Sedgwick Associated Risks, Ltd.,
796 F.2d 299 (9th Cir. 1986) 14

Fuesting v. Zimmer, Inc.,
421 F.3d 528 (7th Cir. 2005),
amended on rehearing by,
448 F.3d 936 (7th Cir. 2006) 26

Goebel v. Denver and Rio Grande Western R.R. Co.,
215 F.3d 1083 (10th Cir. 2000) 22, 24, 26, 28

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 10

Johnson v. Woodcock,
444 F.3d 953 (8th Cir. 2006) 16

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 9, 22, 23, 28

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,
84 F.3d 560 (2d Cir. 1996) 15

Milliken v. Meyer,
311 U.S. 457 (1940) 10

Minnesota Mining and Manuf. Co. v. Nippon Carbide Indus. Co.,
63 F.3d 694 (8th Cir. 1995) 16

Mukhtar v. California State Univ., Hayward,
299 F.3d 1053 (9th Cir. 2002) 23, 24

Mukhtar v. California State Univ., Hayward,
319 F.3d 1073 (9th Cir. 2003) 23

Naeem v. McKesson Drug Co.,
444 F.3d 593 (7th Cir. 2006) 22, 26

OMI Holdings, Inc. v. Royal Ins. Co. of Canada,
149 F.3d 1086 (10th Cir. 1998) 15

Southern Mach. Co. v. Mohasco Indus., Inc.,
401 F.2d 374 (6th Cir. 1968) 8

Superior FCR Landfill, Inc. v. Wright County,
No. COV/98-1911,
2002 WL 511460 (D. Minn. Mar. 31, 2002) 25

Ticketmaster-New York, Inc. v. Alioto,
26 F.3d 201 (1st Cir. 1994) 12, 13, 14, 15

United States v. Bates,
240 F.3d 1073,
2000 WL 1835092 (5th Cir. Nov. 21, 2000) 26

Vermeulen v. Renault, U.S.A., Inc.,
985 F.2d 1534 (11th Cir. 1993) 16

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 11

Constitution, Statute, and Rule

U.S. Const. Amend. XIV, § 1 1

28 U.S.C. § 1254(1) 1

Fed. R. Evid. 702 . . . . . 21, 23, 28

Other Authority

M. Lee, *Burger King's Bifurcated Test for Personal Jurisdiction*,
66 Temp. L. Rev. 945 (1993) 14, 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner cab Produkttechnik GmbH & Co. KG respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The court of appeals decision is unreported and is reproduced in the Appendix starting at 1a. The trial court decision denying Petitioner's motion to dismiss for lack of personal jurisdiction is unreported and is reproduced in the Appendix starting at 28a.

JURISDICTION

The judgment of the court of appeals affirming the trial court was entered on August 24, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, §1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve two separate conflicts in the courts of appeals, one concerning the personal jurisdiction inquiry under the Due Process Clause of the 14th Amendment and the other concerning the admission of expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). First, under this Court's precedent, courts must evaluate the "reasonableness" of exercising personal jurisdiction, especially against international defendants, even where the familiar minimum contacts requirements are met. Conflict and confusion, however, have persisted in the courts of appeals regarding how to implement this Court's directives. In this case, the Sixth Circuit, following its established precedent, applied a presumption in favor of jurisdiction once it determined that minimum contacts were present, and did not evaluate the five factors that typically are used in these cases to measure reasonableness.

The Sixth Circuit's approach stands in stark contrast to the methods used by other courts of appeals that apply no presumption but instead use a "sliding scale" approach or some other independent analysis. What is significant is that other courts of appeals, consistent with this Court's *Asahi* decision, have determined that the reasonableness analysis, in some cases, can trump a finding of minimum contacts. But the Sixth Circuit's approach (and the approach of the Eighth Circuit as well) renders it practically impossible for an alien defendant to overcome even the most minimal of contacts. This disparity in results, as well as approach, renders review by this Court necessary.

Additionally, this case presents an important issue concerning expert testimony: whether a trial court's *post-hoc*

and post-trial findings are relevant to whether that court performed its "gatekeeping" role under *Daubert*. By definition, that gatekeeping role is performed before the expert's testimony is admitted, usually in a pre-trial proceeding. Here, the district court's pre-trial, on the record, ruling was devoid of any reasoning or analysis and therefore inadequate under *Daubert* to satisfy the gatekeeper requirement. That, in turn, forced the Sixth Circuit panel to look to the trial court's post-trial findings on the expert's methodology and reliability to affirm. Looking at *post-hoc* findings, however, is directly contrary to the decisions of at least two courts of appeals that explicitly rejected that approach. This Court should now resolve this conflict.

STATEMENT OF FACTS

1. The Underlying Dispute

This is a breach of contract case that involves an Ohio and a German company. Petitioner cab is a private German company that is primarily in the business of manufacturing thermal transfer printers and label applicators. App. 2a. cab is not licensed to do business in the State of Ohio and has no offices or employees in Ohio. App. 29a. Tharo is located in Brunswick, Ohio, and its primary business is developing bar code label printing software and selling thermal transfer printers and label applicators. App. 2a.

The parties' commercial relationship began in 1987 when personnel from the companies met in London at a product exhibition. App. 30a. cab eventually became a European distributor of Tharo's software. *Id.*

The parties transacted business through the early 1990s and explored the possibility of a joint venture relationship to promote the sale of label printing systems. App. 2a. The only written document that resulted from the parties' course of negotiation was the Letter of Understanding ("LOU") that became the focal point of this case. App. 2a-3a. During the time of their commercial relationship, cab's connection to the State of Ohio was a mere fortuity — Tharo happened to be located there. cab never expressed the desire to exploit any Ohio market.

The LOU is only two pages long and contains fifteen short "points." The LOU had an initial three year term that commenced on May 1, 1996. (Dkt. 1, Exh. A to Exh. 1, State Compl.)[1] Under the LOU, Tharo distributed certain cab products and cab was to give Tharo "preferred pricing" on those products. Despite the parties' largely successful relationship, Tharo decided to cancel the agreement. App. 32a. Under the LOU's cancellation provision, each party was to continue to provide products to the other party for two years after cancellation. In addition, each party was to get "full information" from the other to enable the party to continue the sale of products. App. 3a.

Tharo filed its action against cab when cab disagreed about whether this "full information" provision required it to turn over its printer source code to Tharo, which cab refused to do. App. 3a.

---

[1] "Dkt. ____" refers to the docket numbers in the district court.

2. Pre-Trial and Trial

Tharo filed its breach of contract Complaint in Ohio state court in January 2003 alleging in relevant part a violation of the "preferred pricing" provision and the "full information" requirement. *Id.* On March 7, 2003, cab removed the case to the United States District Court for the Northern District of Ohio based on diversity jurisdiction. *Id.*

cab filed a motion to dismiss for lack of personal jurisdiction on September 3, 2003, which the trial court denied on October 16, 2003. *Id.* The trial court rejected cab's argument that it had not purposefully availed itself of the benefits of Ohio law and that Ohio's only connection to the case was the fact that Tharo happened to be located there. App. 41a. Once it had found minimum contacts, the trial court, following well-established Sixth Circuit precedent, purported to find that the exercise of jurisdiction was also reasonable, but not until presuming that jurisdiction was reasonable in light of its finding of minimum contacts. App. 43a.

Before trial, it became apparent that Tharo intended to rely on the expert testimony of accountant Robert Brlas to prove damages on both the source code and preferred pricing claims. Specifically, Brlas opined that based upon his review of cab's German financial statements, the production cost that Tharo was to pay as the preferred price was lower than that actually invoiced by cab and paid by Tharo; thus, Brlas opined that there had been overcharges. (Dkt. 185, Tr. at 96-102.) Brlas also opined that because cab did not provide Tharo with the printer source code, Tharo would have to incur its own research and development costs to build a printer. (Dkt. 185, Tr. at 87-8.) Brlas, however, had no experience with the research and development of printers and

his analysis on this matter was based upon a series of misguided assumptions. (Dkt. 160, Tr. at 209-26; 258-63.)

As a result of the deficiencies in Brlas' testimony, cab filed a motion *in limine* challenging his competency to testify as an expert under the *Daubert* standard and the reliability of his methodology. App. 3a. The trial court rejected that motion before trial but provided no meaningful discussion or analysis on why it was rejecting cab's arguments. App. 3a; App. 15a. Consequently, Brlas was permitted to testify without limitation.

The deficiencies in Brlas' testimony, however, were apparent. For example, Brlas tried to estimate damages on the "full information" issue by opining on what it would cost Tharo to develop the cab printers on its own. Brlas did not actually create a development budget for those costs. Instead, he merely assumed that Tharo's future development costs would be the same as cab's past costs on an entirely different printer model. (Dkt. 185, Tr. at 88-9.)

Brlas reached that opinion through a series of unsupported assumptions, resulting in nothing more than a guess at what cab's actual development costs might have been. Brlas did not rely upon actual research and development cost information for the cab printers at issue because this information did not exist. Indeed, the only actual development cost that Brlas knew was the cost of developing the mechanical components for a wholly different and new cab printer that was not even mentioned in the LOU. (Dkt. 185, Tr. at 88-89.) From this single figure, Brlas extrapolated his way to the total development costs for the cab printers actually at issue. *Id.*

Without any scientific or factual basis, Brlas assumed that the cost ratio for *production* between electronic and mechanical components equaled the cost ratio for *development* between electronic and mechanical components. *Id.* It bears noting that Brlas acknowledged he could have used other methods to estimate Tharo's "full information" damages. (Dkt. 160, Tr. at 219-20.) Instead, Brlas freely chose to use an untested methodology unsupported by any experience or academic/peer reviewed accounting text.

cab called the reliability of Brlas' testimony into question from the very beginning. And despite this, Brlas never articulated any basis accepted in the accounting field for his assumption that there is *any* relationship between production and development costs or that the ratio of those costs could be manipulated to determine an unknown development cost. In fact, on cross-examination at the *Daubert* hearing, Brlas admitted that he had never seen anyone else in the accounting field make the assumptions or employ the methodology that he used. (Dkt. 185, Tr. 115, 117-18.)

Despite Brlas' completely novel and untested methodology, the district court admitted his testimony with no meaningful discussion or analysis accompanying its pre-trial ruling. The court concluded simply that the testimony was "relevant and reliable" without discussing any of cab's substantive objections to his methodology or its applicability or reliability to this case. App. 15a.

At trial, after determining there was a breach of the LOU, the jury awarded overcharge damages of €1,066,340.65, and "full information" damages of €5,752,361.35, consisting of unspecified amounts of both lost profits and development cost damages. App. 3a.

3. Post-Trial

cab filed a post-trial motion asking for judgment as a matter of law, a new trial, or, in the alternative, remittitur. App. 4a. The trial court rejected some of the damages testimony proffered by Tharo's owner and remitted the "full information" damages to a final amount of €1,768,057.00, which was the exact amount of Brlas' development cost damages testimony. App. 4a. Tharo accepted the remittitur. *Id.*

4. The Sixth Circuit's Decision

On cab's appeal, the Sixth Circuit affirmed. Following its firmly established three-part personal jurisdiction test, as stated in *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968), the Sixth Circuit held that: 1) cab "purposely availed" itself of the privilege of acting in Ohio; 2) Tharo's cause of action "arose from" cab's activities in Ohio; and 3) cab's actions and the consequences thereof had a substantial enough connection to Ohio to make exercising jurisdiction over cab "reasonable." App. 6a – 10a. After the first two prongs of the *Southern Machine* test were met, the Sixth Circuit *presumed* that the final reasonableness prong would also be met. App. 10a. As such, the Sixth Circuit provided nothing more than a cursory treatment of the reasonableness prong in finding that exerting personal jurisdiction over cab would be reasonable in light of this Court's pronouncement in *Asahi*; the Sixth Circuit *never* explicitly discussed the *Asahi* factors other than stating "Tharo has a strong interest in obtaining relief in Ohio." App. 10a.

cab also argued that the trial court abdicated its *Daubert* gatekeeping responsibilities by virtue of its cursory pre-trial

ruling. App. 13a. But rather than confine itself to the trial court's sparse statement on the record after the *Daubert* hearing, the Sixth Circuit relied on the trial court's post-verdict opinion to support its holding that the trial court did not abdicate its gatekeeping role. App. 15a. The Sixth Circuit concluded by stating that "nothing suggests that the trial court overlooked any of the *Daubert* factors" despite the fact that the trial court did not weigh *any* of the *Daubert* factors in its brief decision on the record after the *Daubert* hearing. App. 16a.

REASONS FOR GRANTING THE WRIT

By failing to conduct any meaningful inquiry into the reasonableness of exerting personal jurisdiction over cab, the Sixth Circuit's decision directly conflicts with the decisions of other courts of appeals and this Court. Moreover, the Sixth Circuit's reliance upon the trial court's post-verdict rationalization for allowing Tharo's expert to testify ignores this Court's decisions in *Daubert* and *Kumho Tire* regarding the gatekeeping responsibilities of the trial court and conflicts with other courts of appeals. These conflicts in the important areas of personal jurisdiction and *Daubert* gatekeeper responsibilities are significant and merit this Court's review.

I. The Courts of Appeals and State Courts Are Divided On How To Implement This Court's Reasonableness Due Process Requirement For The Exercise of Personal Jurisdiction

Courts generally must exercise personal jurisdiction consistent with the requirements of Due Process under the 14th Amendment. By now, the major cases from this Court are familiar. However, at least one issue has lingered since this Court's fractured decision in *Asahi*, namely, how should

the lower courts ensure that the exercise of jurisdiction is "reasonable" even where "minimum contacts" exist, especially where a foreign defendant is involved.

A. This Court's Precedent Requires a Meaningful Five-Factor Reasonableness Analysis in Personal Jurisdiction Cases

Obviously, all courts agree that the 14th Amendment requires that they assess whether the defendant has "minimum contacts" with the forum before they can assert personal jurisdiction. This requirement traces back to at least this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). But the question of what more is required to satisfy the requirement that jurisdiction also comport with "traditional notions of fair play and substantial justice" traces back perhaps just as far. *See id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Two later cases from this Court suggested strongly that a wholly separate analysis to determine whether jurisdiction is "reasonable," even in the face of minimum contacts, is required under the Due Process Clause. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). Because *Asahi*, however, produced several opinions and no solid majority for one unified theory, uncertainty has lingered in the lower courts.

After acknowledging in *Burger King* that the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State," 471 U.S. at 474, the Court stated that "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may

be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 476. A defendant found to have purposefully directed activities to the forum had the opportunity to show that the exercise of jurisdiction was still unreasonable.

While the *Burger King* Court plainly contemplated a two-step process, there remained some uncertainty regarding how minimum contacts ought to "be considered in light of" the additional reasonableness factors. The Court reaffirmed the necessity of some separate reasonableness analysis in *Asahi*, which, like this case, involved an alien defendant and a largely international dispute. This Court unanimously agreed that a California court did not have personal jurisdiction over the defendant, though the exact theories differed.

Importantly, however, Part II-B of the Court's opinion, joined by eight Justices, determined that the exercise of jurisdiction would be unreasonable based upon the following factors:

> [1] the burden on the defendant, [2] the interests of the forum State, [3] the plaintiff's interest in obtaining relief, . . . [4] "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and [5] the "shared interest of the several States in furthering fundamental substantive social policies."

480 U.S. at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)); *Burger King*, 471 U.S. at 477.

Specifically, the Court determined that where a foreign defendant is involved, a court must give "significant weight" to "the unique burdens placed upon one who must defend oneself in a foreign legal system." *Id.* at 114. The Court found that the foreign plaintiff and the forum state of California had minimal interests in resolving the case in California. The Court emphasized that courts must consider the "procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the [forum] court" when an alien defendant is involved. *Id.* at 115; *see also id.* ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."). Considering all of these factors, the Court concluded that the assertion of jurisdiction would be unreasonable.

Four Justices concluded that jurisdiction was unreasonable even though they found that the minimum contacts requirement had been satisfied. *See id.* at 116 (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in part and concurring in the judgment). A fifth Justice concluded that it was not even necessary to reach the minimum contacts analysis once unreasonableness was found. *Id.* at 121-22 (Stevens, J., joined by White and Blackmun, JJ., concurring in part and concurring in the judgment). Thus, although *Asahi* produced three separate opinions, apparently a majority of the Court agreed not only that a separate reasonableness inquiry using the five factors from *Burger King* must be performed, but also that this separate requirement can lead to a rejection of jurisdiction even where minimum contacts are present. Nevertheless, due in part at least to the fractured nature of the *Asahi* decision, uncertainty has remained amongst the lower courts regarding the implementation of the reasonableness requirement. *See, e.g.*, *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 209 (1st

Cir. 1994) ("This aspect of the jurisdictional inquiry remains something of an unknown quantity.").

B. By Employing a Presumption in Favor of Reasonableness, the Court of Appeals Decision Conflicts with the Decisions of Other Courts of Appeals

In accordance with well-established Sixth Circuit precedent, the panel in this case, once it had determined that minimum contacts were present, applied a "presumption" that jurisdiction was proper and further eschewed any detailed analysis of the five *Asahi* factors (though it certainly mentioned facts related to a couple of them). But the Sixth Circuit's "presumption" approach to reasonableness places it in direct conflict with the approaches of other lower courts, which, in some manner or another, independently assess the reasonableness of jurisdiction. Importantly, what has happened in practice is that the Sixth Circuit's presumption has made it impossible for an alien defendant to overcome even a minimal showing of contacts with a reasonableness showing. Petitioner is aware of no case where any defendant has overcome the presumption in the Sixth Circuit. By contrast, the approaches of other circuits, which are more consistent with the dictates of this Court, have led to a number of cases in which the reasonableness analysis has trumped an original finding of minimum contacts -- as in *Asahi* itself.

For example, the First Circuit applies a "sliding scale" approach to minimum contacts. *Ticketmaster*, 26 F.3d at 210. In *Ticketmaster*, the court held that the Due Process Clause bars a court from asserting jurisdiction where it would be "fundamentally unfair." *Id.* Furthermore, "gauging fairness requires an assessment of reasonableness for, in certain

circumstances, unreasonableness can trump a minimally sufficient showing of relatedness and purposefulness." *Id.* As a result, the court adopted a "sliding scale," under which "the weaker the plaintiff's showing on the first two prongs (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction," with the converse true as well. *Id.* In the case itself, the court, applying the sliding scale and analyzing carefully each one of the *Asahi* factors in great depth, concluded that jurisdiction over an out-of-state defendant was unreasonable despite the presence of minimum contacts. *Id.* at 212.

In its opinion, the First Circuit also noted that the Ninth Circuit has "concluded that dismissal may be appropriate on grounds of reasonableness even if considerations of relatedness or purposefulness, taken in isolation, could support the exercise of jurisdiction." 26 F.3d at 210 (citing *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) (finding the assertion of jurisdiction unreasonable though the showing of purposefulness was "certainly of a nature that would support jurisdiction")). Indeed, the Ninth Circuit itself also employs a "sliding scale" and, according to Judge Selya, has used the reasonableness analysis "regularly to defeat jurisdiction." *Ticketmaster*, 26 F.3d at 209 (citing M. Lee, *Burger King's Bifurcated Test for Personal Jurisdiction*, 66 Temp. L. Rev. 945 (1993)).[2]

---

[2] In the words of the First Circuit, its "sliding scale" analysis "differs slightly" from the Ninth Circuit, 26 F.3d at 210 n.13, but there is no question that the approach of both circuits differs markedly from the presumption employed in the Sixth Circuit. *See Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1488 (9th Cir. 1993).

A "sliding scale" approach was also used by the Tenth Circuit in *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091-92, 1095 (10th Cir. 1998). Relying in large part on the *Ticketmaster* court's analysis, the Tenth Circuit, after "examining the [*Asahi*] factors in their entirety," concluded that the exercise of jurisdiction would be "unreasonable and inconsistent with the notions of 'fair play and substantial justice,'" even though minimum contacts were present. *OMI*, 149 F.3d at 1098. Again, the court analyzed the *Asahi* factors in great depth (in contrast to the Sixth Circuit in this case) before rejecting jurisdiction over an alien defendant. It also appears that the Second Circuit follows a sliding scale approach. In *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996), the court concluded that it "must weigh the relative strengths and weaknesses of each requirement-that is, depending upon the strength of the defendant's contacts with the forum state, the reasonableness component of the constitutional test may have a greater or lesser effect on the outcome of the due process inquiry." In that case, again, the court found that minimum contacts existed but, after examining each one of the five factors in detail, determined that the exercise of jurisdiction was unreasonable. *Id.* at 575.

Other jurisdictions simply apply a general two-part framework with a distinct reasonableness analysis that can trump a finding of minimum contacts. While these jurisdictions do not expressly employ a "sliding scale," like the above courts, they do not employ a presumption in favor of jurisdiction like the Sixth Circuit. Thus, these courts represent yet a third approach to the reasonableness inquiry.

In *Ellicott Machine Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 477 (4th Cir. 1993), the court characterized the jurisdictional inquiry as a "two-step process," where the

second step involves an application of the familiar five factors. *See id.* at 479 ("*Asahi* made clear that these factors apply with particular force in actions against foreign national defendants."). In that case, the court analyzed the five factors and determined that jurisdiction against an Australian defendant was unreasonable despite minimum contacts. The Eleventh Circuit appears to follow a similar analysis. Although the court in *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1551 (11th Cir. 1993) did not find on the facts of that case that reasonableness trumped minimum contacts, it certainly recognized that such a situation could occur and did not employ a presumption in its analysis.

Finally, though the cases are not entirely uniform, the Eighth Circuit has traditionally followed its own multi-factor jurisdictional analysis that examines some of the *Asahi* considerations but, in reality, does not contain the separate "reasonableness" analysis contemplated by this Court. *See, e.g., Johnson v. Woodcock*, 444 F.3d 953, 956 (8th Cir. 2006); *Minnesota Mining and Manuf. Co. v. Nippon Carbide Indus. Co.*, 63 F.3d 694, 697 (8th Cir. 1995). Not surprisingly, under this framework, Petitioner was unable to locate any case from the Eighth Circuit that denied jurisdiction where minimum contacts were present.

Thus, what is important here and what necessitates this Court's review is not only the conflict in the courts of appeals with respect to their approaches to "reasonableness" and the dictates of *Burger King* and *Asahi*, but the very distinct possibility, and indeed reality, that these differences in approach result in different outcomes. In at least two of the Circuits, including the Sixth, it would appear to be virtually impossible for a defendant to show that an exercise of jurisdiction is unreasonable in the face of minimum contacts,

thereby depriving such defendants of the due process protections guaranteed by the 14th Amendment.

C. The Exercise Of Jurisdiction in This Case Is Clearly Unreasonable Under a Meaningful Reasonableness Inquiry

As discussed below, had the court of appeals in this case undertaken a comprehensive analysis of the five reasonableness factors established by *Burger King* and *Asahi*, the outcome of this case likely would have been different: the exercise of personal jurisdiction in this case is unreasonable.

1. Burden on the defendant

Asahi, like the current case, involved an alien defendant and an underlying dispute concerning activity that occurred almost entirely in a foreign country. This Court noted, under the first factor, that the "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 114. In this case, neither the trial court nor Sixth Circuit gave cab's "unique burdens" as an international defendant in a foreign legal system the requisite "significant weight."

As in *Asahi*, the burden of cab defending itself in Ohio was severe. cab is a private, family-owned, German company with its principal place of business in Germany. App. 2a. It does not have an office, mailing address, or a license to do business in the state of Ohio. App. 29a. It has no employees working in Ohio and does not own property or a bank account in Ohio. cab had to travel to Ohio from Germany to defend itself in a court system substantially

different from Germany's legal system based on the civil code, where U.S.-style discovery does not exist and the use of expert witnesses is vastly different.

2. Interests of the forum state

The interests of Ohio in this case are no greater than Tharo's own interests. Germany has interests at least as significant as Ohio. While Tharo is an Ohio company, the essence of this dispute has little to do with Ohio. The LOU was drafted in Germany by cab, including an English version for the benefit of Tharo's president who does not read or speak German. App. 31a. Tharo signed both versions of the LOU in Ohio and cab signed both in Germany. App. 31a.; Dkt. 32, Motion at Exh. 2. Many of the initial contacts and discussions between the parties occurred in locations other than Ohio, such as England, Illinois, and Florida. App. 30a, 32a. cab discussed the terms of the LOU with Tharo by telephone and e-mail from Germany. App. 30a. These communications only reached Ohio because that is where Tharo chose to be located. cab's alleged breaches of the LOU arose from its actions in Germany. The printers at issue in this case were designed and manufactured by cab in Germany. This dispute does not involve issues of particular importance to Ohio — there is no state regulatory, safety issue, or social policy at stake and breach of the LOU has no significant impact of Ohio's economy.

3. Plaintiff's interest in obtaining relief

While Tharo has an interest in obtaining relief, as does every plaintiff in every case, Tharo's interest in a domestic forum is minimal in this dispute. Tharo's main interest in pursuing this action in Ohio is to serve its own convenience. Yet, Germany is where cab and the majority of the fact

witnesses and documentary evidence in this case are located. Importantly, Tharo never suggested that it could not obtain relief in the German court system and there can be no credible suggestion that Germany's court system would prevent Tharo from seeking relief there. At its core, Tharo's interest in an Ohio forum is reduced to convenience and in literally having a "home court" advantage over cab.

4 & 5. Interstate judicial system's interest in obtaining the most efficient resolution of controversies and

Shared interest of the several States in furthering fundamental substantive social policies

The *Asahi* Court held that the final two reasonableness factors carry unique significance in international disputes. 480 U.S. at 115 (citation omitted). But in this case, neither the trial court nor the Sixth Circuit gave any consideration to whether asserting personal jurisdiction over cab would result in the most efficient resolution of the controversies between Tharo and cab.

Indeed, the contrary holds true here. As discussed above, virtually all of the evidence supporting Tharo's claims is located in Germany. Importantly, any judgment issued by an Ohio court has to be transferred to Germany for enforcement since cab has no presence in the United States, subjecting the judgment to scrutiny by a German court that would decide whether the Ohio proceedings and judgment survive under principles of German law. As a result, by asserting personal jurisdiction over cab, the Ohio court virtually ensured that courts in two nations will determine the final outcome of the parties' disputes. The *most* efficient resolution of this matter

would have been achieved if Tharo simply sought relief against cab *in Germany* where all substantive and procedural issues could have been resolved in one court system.

There is no question that the underlying dispute in this case originated based on conduct by cab in Germany and implicates the policies of foreign nations as much, if not more so, than of the United States. Plainly, this is a case where "the procedural and substantive policies of other *nations*" and their legal systems may be "affected by the assertion of jurisdiction by the [forum] court." *Id.* The effects of those policies should have been considered as part of a reasonableness inquiry. Yet this is exactly what the Sixth Circuit, following its established minimum contacts analysis and presumption of reasonableness, failed to do.

On balance, had the trial court and court of appeals analyzed the reasonableness factors in this case, the exercise of personal jurisdiction over cab would have been found to have been unreasonable.

D. This Issue Is Important and Recurring

The jurisdictional issue in this case is important and recurring and warrants this Court's review. As noted above, the implementation of the reasonableness requirement has perplexed the courts of appeals since this Court's fractured decision in *Asahi*. Different approaches have existed in the courts of appeals since that time. *See* Lee, *supra*. Obviously, personal jurisdiction that falls within the requirements of the Constitution is a prerequisite before any court in the United States can proceed to a valid judgment.

The above cases illustrate not only differences in approaches but differences in actual results as well. The

impact of this analysis cannot be overemphasized. Companies in the U.S. frequently reach out to foreign companies and that practice has only grown since *Asahi* was decided twenty years ago. The lack of a uniform approach to these issues hinders business planning because foreign-based enterprises are left uncertain as to whether they will be subject to unreasonable assertions of jurisdiction against them by U.S. courts. A uniform approach to jurisdiction is essential and only this Court can provide the proper guidance.

II. The Decision Below Conflicts With The Decisions Of Other Courts of Appeals By Examining the District Court's *Post-Hoc* Findings To Determine Whether It Satisfied Its *Daubert* "Gatekeeping" Function

Under Federal Rule of Evidence 702 and decisions of this Court, trial courts function as "gatekeepers" that must closely examine the reasoning and methodology that underlay the proposed expert testimony, determine whether it is scientifically valid, and determine whether it is sufficiently reliable in the context of the case to be presented to a jury. The court of appeals decision here creates a circuit split on the legal question of whether a trial court can satisfy its gatekeeper role by making post-trial, post-admission findings regarding admissibility rather than explaining on the record, before the testimony is presented to the jury, the rationale for its decision. By examining the trial court's *post-hoc* rationale here, the court of appeals created a circuit split with the Tenth and Ninth Circuits and ruled in a way that is contrary to the decisions of this Court and Rule 702. This Court should grant certiorari to resolve this conflict.

A. The Courts of Appeals Are in Conflict on Whether a Trial Court's Post-Trial Findings Are Relevant to Whether it Properly Exercised its *Daubert* "Gatekeeping" Function

By relying on the trial court's post-trial determinations to find that the trial court had satisfied its "gatekeeping" function, the court of appeals created a conflict with at least two circuits that have rejected that very practice. The circuits agree that they must review *de novo* the question of whether a trial court has abdicated its gatekeeper responsibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See, e.g.*, *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 607 (7th Cir. 2006); *Elcock v. Kmart Corp.*, 233 F.3d 734, 745 (3d Cir. 2000); *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087-88 (10th Cir. 2000); *see also Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring). Only after determining whether the trial court has satisfied that duty does an appellate court afford discretion to the trial court's actual admissibility decision. Here, the circuit split concerns the different approaches taken by the courts of appeals in evaluating whether the trial court has abdicated its gatekeeping responsibility.

This Court's decision in *Daubert* requires trial courts to perform the role of gatekeeper in order to "ensure the reliability and relevancy of expert testimony." *Kumho Tire*, 526 U.S. at 152; *Daubert*, 509 U.S. at 589, 597. The trial court must conduct a preliminary assessment of reliability, including whether the expert's "methodology properly can be applied to the facts in issue." *Id.* at 93. And, "where [the expert's] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a

reliable basis in the knowledge and experience of [the relevant] discipline.'" *Kumho Tire*, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592). The *Daubert* Court and the Rule 702's advisory committee's note, provide a non-exhaustive list of factors that a trial court could look at to determine whether the proffered expert testimony is sufficiently reliable to be admitted into evidence. 509 U.S. at 593-94; Fed. R. Evid. 702 advisory committee's note (2000 amends.). And while the district courts have discretion to determine how to evaluate that reliability, that discretion "does *not* include the discretion to abdicate completely its responsibility to do so." *Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002).

In considering whether a district court has satisfied this gatekeeper responsibility, two courts of appeals have found that it is inappropriate to rely on a trial court's post-admission findings, which is what the Sixth Circuit did in this case. In *Mukhtar*, the Ninth Circuit determined that the trial court had abdicated its *Daubert* gatekeeping responsibility where it "said nothing about the *reliability* of [the expert's] testimony." 299 F.3d at 1065. In an amended opinion, the Ninth Circuit rejected the argument that the case should be remanded for a hearing in the trial court on the reliability issue. The court noted that "[t]o remand for an evidentiary hearing post-jury verdict undermines *Daubert*'s requirement that *some* reliability determination must be made by the trial court *before* the jury is permitted to hear the evidence." *Mukhtar v. California State Univ., Hayward*, 319 F.3d 1073, 1074 (9th Cir. 2003). Indeed,

> Otherwise, instead of fulfilling its mandatory role as a gatekeeper, the district court clouds its duty to ensure that only reliable evidence is presented with impunity. A post-verdict analysis does not protect the

> purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny.

Id.

Similarly, in *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1229 (10th Cir. 2003), the Tenth Circuit decided that a district court had abdicated its gatekeeper role in admitting certain expert testimony. Again, the court rejected a remand of the case to the district court to make *post-hoc* findings regarding admissibility: "for we think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts." *Id.* The *Dodge* court also quoted language from the amended opinion in *Mukhtar*, *supra*, with approval. *Id.*

The principle embraced by these two cases is evident the *Daubert* gatekeeper function cannot be satisfied by a district court through the use of *post-hoc* findings or rationalizations. Indeed, the very notion of a "gatekeeper" is that of a person either allowing or barring entry at the beginning, not after the fact.

Standing in sharp contrast to the decisions from the Tenth and Ninth Circuits is the panel decision in this case.[3]

---

[3] The Tenth Circuit's decision in *Goebel*, *supra*, which found that a district court had abdicated its *Daubert* gatekeeper role, suggests in *dicta* that a district court can satisfy its gatekeeper role in ruling on a post-trial motion. 215 F.3d at 1087. At least two later, district court decisions have cited *Goebel* for that proposition. *See Drake v. Delta Air Lines, Inc.*, No. 94-CV-5944, 2005 WL

Petitioner cab in this case challenged the admissibility of Respondent's expert witness. cab specifically questioned the expert's methodology and the reliability of his methodology as applied to the facts of this particular case. In a transcript ruling devoid of any substantive discussion or analysis of its decision, the trial court ruled in favor of admitting the expert testimony. App. 15a. In its post-trial motions, cab challenged the admissibility of the expert's testimony at trial. In a post-trial ruling, the trial court gave a lengthier statement on the propriety of the expert's testimony. App. 15a-16a. On appeal, Petitioner specifically argued that the district court had abdicated its gatekeeping analysis by failing to engage in any substantive analysis pre-trial. Indeed, the trial court had failed to mention any factors bearing on reliability, whether mentioned in *Daubert* or not. In response to Petitioner's argument on appeal, the Sixth Circuit panel looked to the trial court's cursory pre-trial ruling but principally relied upon the trial court's post-verdict explanation. App. 16a. Following a lengthy quotation from the trial court's post-trial findings, the court of appeals concluded that "the trial court's analysis sufficiently establishes that it did not abdicate its gatekeeping role." *Id.*

A brief comparison shows that the trial court's post-trial analysis, while not extensive by any means, contained more substance than its brief and conclusory pre-trial ruling. App. 15a-16a. The post-trial ruling at least contains certain specifics about the testimony at issue. Moreover, the Sixth

---

1743816, *8 (E.D.N.Y. July 21, 2005); *Superior FCR Landfill, Inc. v. Wright County*, No. COV/98-1911, 2002 WL 511460, *5 (D. Minn. Mar. 31, 2002). But the Tenth Circuit's later holding in *Dodge*, rejecting the possibility of *post-hoc* findings to satisfy the gatekeeper requirement, is conclusive evidence of the circuit's position on this issue.

Circuit panel's invocation of the trial court's post-trial discussion is vital to its conclusion that the trial court did not abdicate its gatekeeper role here. According to the court of appeals opinion, "nothing suggests that the trial court overlooked any of the *Daubert* factors." App. 16a. But when the post-trial ruling, which the court should not have considered to evaluate the gatekeeping question, is taken away, there remains nothing in the pre-trial ruling suggesting that the trial court *did* examine any "*Daubert* factors."

Indeed, the courts of appeals nearly uniformly hold, consistent with this Court's requirements, that in the face of an objection, a trial court must make an express determination, on the record, regarding the expert's reliability and relevance: "Without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court 'carefully and meticulously' review[ed] the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony." *Goebel*, 215 F.3d at 1088 (internal quotation omitted); *accord, e.g.*, *Naeem*, 444 F.3d at 608; *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005), *amended on rehearing by*, 448 F.3d 936 (7th Cir. 2006); *Dodge*, 328 F.3d at 1225; *United States v. Bates*, 240 F.3d 1073, 2000 WL 1835092, at *3 (5th Cir. Nov. 21, 2000). In this case, the pre-trial ruling makes no mention of any of the factors suggested in the *Daubert* opinion itself or any other court opinions. The trial court made no attempt to answer any of cab's objections in its briefing or at the hearing.

In *Naeem*, for example, the court held that the trial court's conclusory statement that the expert had "sufficient expertise" was "not enough to show that the district court applied the *Daubert* standard; the court provided no ***analysis*** of [the expert's] methodology." *Naeem*, 444 F.3d at 608 (emphasis

added). Similarly, in *Fuesting*, the court found that the district court had failed to "assess the reliability of the *methodology* the expert has employed in arriving at his opinion." 421 F.3d at 535. The trial court there failed to "mention . . . whether and why it found [the expert's] method reliable. To satisfy its essential role, the gatekeeper must do more than just make conclusory statements." *Id.*

In *Dodge*, the district court held a *Daubert* hearing, but failed to make any specific, detailed findings on the record concerning the testimony of the experts: "These findings lack the degree of specificity that would allow us to determine whether the district court properly applied the relevant law." 328 F.3d at 1226. Similarly, in the present case, the trial court issued its ruling at the *Daubert* hearing but failed to articulate findings on the record explaining the ruling. *Compare* App. 15a. While the trial court concluded that the testimony was "relevant and reliable," the court failed to indicate what about the testimony made it reliable in this particular case. App. 15a. cab challenged specifically whether the expert's "benchmarking" analysis (which is certainly acceptable in some contexts) was proper and reliable in this case. The trial court never answered that question (among others).

* * * * *

The court of appeals here relied on the trial court's *post-hoc* rationalizations to find that it satisfied its *Daubert* gatekeeper role in the fact of what was an obviously inadequate pre-admission analysis. Its decision is inconsistent with the contrary views taken by at least two other courts of appeals. Accordingly, this Court's review is warranted.

B. This Is an Important and Recurring Issue

There is no question that this particular *Daubert* issue is both important and recurring and ought to be addressed by this Court. As a general matter, federal trial and appellate courts have grappled with the application of *Daubert* and *Kumho Tire* from the time that this Court decided those cases. Indeed, the number of cases, academic articles, and practice manuals dealing with expert issues are too numerous to count.

Nevertheless, what is apparent is that the issue presented here concerning the *Daubert* gatekeeper analysis is particularly crucial. Whether a trial court can make *post-hoc* determinations to satisfy its *Daubert* gatekeeping obligation goes to the core *Daubert* legal requirement. *See Goebel*, 215 F.3d at 1087 ("*Daubert* changed the law of evidence by establishing a 'gatekeeper' function for trial judges under Federal Rule of Evidence 702."). The gatekeeping role must be performed in every single case where an objection is raised to expert testimony. Thus, unlike the countless number of *Daubert* cases that involve whether a particular expert's testimony should have been permitted, this case presents a more fundamental, threshold issue about the requirements surrounding that analysis itself. As such, any confusion here impacts countless cases at a very basic level. For that reason, this Court should review this question.

CONCLUSION

For the reasons given above, this Court should grant certiorari, review the two questions presented and reverse the court of appeals decision.

Respectfully submitted,

JOHN B. NALBANDIAN
Counsel of Record
Taft, Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
(513) 381-2838

JON P. YORMICK
NICHOLAS A. PANAGOPOULOS II
Yormick & Associates Co., L.P.A.
Key Tower - 52nd Floor
127 Public Square
Cleveland, Ohio 44114
(216) 928-3474

PETER M. POULOS
Taft, Stettinius & Hollister LLP
200 Public Square, 3500 BP Tower
Cleveland, Ohio 44114
(216) 241-2838

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-3876

[Filed August 24, 2006]

THARO SYSTEMS, INC., Plaintiff-Appellee,	)
v.	)
cab PRODUKTTECHNIK GmbH & CO. KG, Defendant-Appellant.	)

On Appeal from the United States District Court for the Northern District of Ohio

Before: DAUGHTREY and COOK, Circuit Judges; and COLLIER, District Judge.*

* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION

COOK, Circuit Judge. After finding that Defendant cab Produkttechnik GmbH & Co. Kg ("cab") breached its contract with Plaintiff Tharo Systems, Inc. ("Tharo"), a jury awarded over €6 million (Euros) in damages to Tharo. cab filed several post-judgment motions, seeking, among other things, judgment as a matter of law, a new trial, and remittitur. The magistrate judge[1] granted remittitur and reduced the damage award, which Tharo accepted, and also granted Tharo's motion for prejudgment interest, cab now appeals asserting various grounds for reversal. With the exception of one issue that the parties agree requires a remand, we affirm.

I.

Tharo, an Ohio corporation, develops software for printing computerized bar code labels and sells and services special printers designed to print the labels and affix them to products, cab, a German corporation, manufactures the printers and label applicators. The parties' commercial relationship started in the mid-1980s and continued through 2003. In the 1990s, the parties explored the possibility of a joint venture aimed at designing and building their own label-printing system to be marketed worldwide. Negotiations culminated in 1996 with the signing of a Letter of Understanding ("LOU") intended to allow the parties "to work together . . . to become independent of other

---

[1] The parties consented to having a magistrate judge conduct the proceedings in the case, including the trial. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. This opinion uses the terms "magistrate judge" and "trial court" interchangeably.

manufacturers." The LOU referred to the parties' relationship as the "CTC partnership."

Some eight years later, Tharo terminated the LOU after learning that cab intended to establish its own distribution networks in the U.S., in violation of the LOU, and had not been providing Tharo with "preferred pricing." In accordance with the LOU (Point 10), Tharo requested that cab provide Tharo with "full information" to enable Tharo to continue selling products following the partnership's dissolution. Specifically, Tharo requested "printer and board schematics, and firmware source code[s]" for several lines of printers. In its written response, cab asserted that: the LOU did not represent a contract; it never acted contrary to the LOU; and in any event, certain information requested was for printers not covered by the LOU.

Tharo filed a complaint in state court, alleging (as later amended) that cab breached the parties' contract by overcharging Tharo (the "overcharge claim") and by refusing to supply the requested "source codes" (the "failure-to-provide-information claim"), cab removed the case to federal court and filed a Fed. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction, which the trial court denied.

The week before trial, cab filed a motion *in limine* seeking to preclude Tharo's expert accounting witness, Robert Brlas, from testifying. The magistrate judge, after a hearing, denied the motion, finding Brlas qualified as an expert and his testimony "relevant and reliable." The trial resulted in a jury verdict for Tharo on both claims and a total damages award of just over €6.7 million--some €1.0 million on the overcharge claim and about €5.7 million on the failure-to-provide-information claim.

Post-trial, Tharo moved to alter or amend the judgment to include prejudgment interest on the entire damages award, cab, on the other hand, moved for judgment as a matter of law or for a new trial on the failure-to-provide-information claim. Alternatively, cab moved for remittitur on this claim. The magistrate judge denied the motions for judgment as a matter of law and new trial, but ordered the damages on the failure-to-provide-information claim remitted to approximately €1.7 million, conditioned on Tharo's acceptance. Tharo later accepted, after which the magistrate judge awarded Tharo prejudgment interest on the revised damages award on both claims and then entered final judgment, cab now appeals.

II.

A. Personal Jurisdiction

As a threshold matter we "conduct a plenary review of [the] personal jurisdiction issue." *CompuServe, Inc. v. Patterson,* 89 F.3d 1257, 1262 (6th Cir. 1996). Tharo, as the party asserting personal jurisdiction, "bears the burden of showing such jurisdiction exists." *Id.* To defeat the motion, Tharo need only make a prima facie showing of jurisdiction. *Id.* And, because the trial court ruled without conducting an evidentiary hearing, we must consider the pleadings and affidavits in a light most favorable to Tharo (the non-moving party), *Theunissen v. Matthews,* 935 F.2d 1454, 1458 (6th Cir. 1991), and we cannot "weigh the controverting assertions of the party seeking dismissal." *CompuServe,* 89 F.3d at 1262 (quotation omitted); *see also Intera Corp. v. Henderson,* 428 F.3d 605, 614 (6th Cir. 2005).

In a diversity case, a federal court can exercise personal jurisdiction over a defendant if jurisdiction is "(1) authorized

by the law of the state in which it sits[,] and (2) in accordance with the Due Process Clause of the Fourteenth Amendment." *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 888 (6th Cir. 2002).

1. Ohio's Long-Arm Statute

Under Ohio's long-arm statute, "[a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's . . . [t]ransacting any business in this state." Ohio Rev. Code § 2307.382(A). The injury must also arise out of the contacts with Ohio. *Brunner v. Hampson*, 441 F.3d 457, 463 (6th Cir. 2006) (interpreting Ohio Rev. Code § 2307.382(C)).

On the strength of the Ohio Supreme Court's broad reading of the phrase "transacting any business," we agree that cab transacted business in Ohio. *See Ky. Oaks Mall Co. v. Mitchell's Formal Wear*, 53 Ohio St. 3d 73, 559 N.E.2d 477, 480 (Ohio 1990) ("'Transact' . . . embraces in its meaning the carrying on or prosecution of business negotiations . . . and may involve business negotiations which have been either wholly or partly brought to a conclusion."), cab and Tharo carried on a business relationship in Ohio for over 15 years. Moreover, as the trial court concluded, because "the LOU was the basis of cab's transactions in Ohio, and [because] Tharo's claims are for breach of the LOU, the cause of action . . . arises from cab's transactions in Ohio." Accordingly, we agree that Ohio's long-arm statute authorizes jurisdiction over cab.

2. Due Process

Due process mandates that jurisdiction be exercised only if cab has sufficient "minimum contacts" with Ohio such that

summoning cab to defend in Ohio would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95(1945) (quotation omitted). We use a three-part test for determining whether the exercise of personal jurisdiction over an out-of-state defendant comports with due process:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state.
>
> Second, the cause of action must arise from the defendant's activities there.
>
> Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Chandler v. Barclays Bank PLC, 898 F.2d 1148, 1151 (6th Cir. 1990) (quotation omitted); *see S. Mach. Co. v. Mohasco Indus., Inc.,* 401 F.2d 374 (6th Cir. 1968).

1. "Purposeful Availment." The court may not exercise personal jurisdiction over cab unless cab has purposefully entered into a connection with the forum "such that [it] should reasonably anticipate being haled into court [in Ohio]." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). This "ensures that [cab] will not be haled into [Ohio] solely as a result of 'random,' 'fortuitous' or 'attenuated" contacts." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (quotation omitted). Though "[t]he mere existence of a contract . . . is insufficient to confer

personal jurisdiction," *Calphalon Corp. v. Rowlette,* 228 F.3d 718, 722 (6th Cir. 2000), when "a nonresident defendant transacts business by negotiating and executing a contract via telephone calls and letters to an Ohio resident, then the defendant has purposefully availed himself of the forum by creating a continuing obligation in Ohio." *Cole v. Mileti,* 133 F.3d 433, 436 (6th Cir. 1998); *see LAK, Inc. v. Deer Creek Enterprises,* 885 F.2d 1293, 1300 (6th Cir. 1989) ("[W]ith respect to interstate contractual obligations . . . parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." (quotation omitted)).

Tharo made a prima facie showing that cab purposefully availed itself of the privilege of acting in Ohio. Looking at the quality and quantity of cab's contacts with Ohio we agree with the trial court that cab "consciously reached out from [Germany] to Ohio" to create an ongoing business relationship. *CompuServe,* 89 F.3d at 1266. cab frequently negotiated with Tharo through telephone calls, e-mails, and faxes directed to Ohio; cab officials visited Ohio (including a visit to finalize the LOU); the LOU envisioned a long-term partnership; the parties communicated frequently after executing the LOU, Tharo performed tasks in Ohio at cab's direction; cab shipped printers to Ohio; and cab's employees traveled to Ohio in fulfilling cab's contractual obligations.

cab, relying on *Calphalon Corp. v. Rowlette,* argues that its "contacts in Ohio with Tharo [were] . . . 'random,' 'fortuitous,' and 'attenuated," and thus Tharo failed to make a prima facie showing that cab purposefully directed its contacts to Ohio. We disagree. Calphalon was an Ohio corporation. Rowlette was a Minnesota corporation and Calphalon's exclusive representative in Minnesota. Though

Rowlette sent letters and faxes and made telephone calls to Ohio (and made three trips to Calphalon's facilities there for a tour and meetings), this court held that Ohio lacked personal jurisdiction over Rowlette, *Calphalon* at 722, despite the existence of a contract. The court concluded that Rowlette's contacts with Ohio were too "fortuitous" or "attenuated" to support the exercise of jurisdiction because Rowlette's obligations under the agreement were to be performed outside of Ohio and because Rowlette was not seeking to exploit a market for Calphalon's products in Ohio. *Id.* at 723. The court also noted that Rowlette's contacts with Ohio (by letter, telephone, fax and personal visits there) resulted not because Rowlette chose to create continuous and substantial consequences in Ohio, but because Calphalon chose to be headquartered there. *Id.*

cab's contacts with Ohio, however, were not "solely a result of Tharo's choice of location" because cab affirmatively reached out to Tharo in Ohio to negotiate the LOU in an effort to strengthen the parties' mutual business relationship. In contrast, there is no mention in *Calphalon* that Rowlette "reached out" to Ohio to negotiate with Calaphon. cab's position is comparable to the defendant's in *Burger King*. *See Burger King,* 471 U.S. at 479 (noting that where a party "deliberately '[reached] out beyond' Michigan and negotiated with a Florida corporation . . . and the manifold benefits that would derive [therefrom]. . . the 'quality and nature' of the relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated'" (citation omitted) (first alternation in original)).

2. "Arising From." If the cause of action has "a substantial connection with [cab's Ohio] activities," the "arising from" prong of the three-part test is satisfied. *S. Mach.*, 401 F.2d at 384 n.27. Put another way, the test is

satisfied where "a defendant's contacts with the forum state are related to the operative facts of the controversy." *CompuServe,* 89 F.3d at 1267.

As we have already held, cab "reached out" to Ohio and created a continuing contractual obligation there. And because "the cause of action is for breach of that [obligation], . . . [it] naturally arises from the defendant's activities in Ohio." *Cole,* 133 F.3d at 436 (citing *CompuServe,* 89 F.3d at 1267 and *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 229 (6th Cir. 1972)); *see In-Flight Devices,* 466 F.2d at 229 ("Defendant's transaction of business in Ohio -- its entering of a contractual relationship with an Ohio corporation -- is necessarily the very soil from which the action for breach grew.").

cab stresses that the "activities allegedly giving rise to Tharo's claims . . . occurred outside Ohio," and concludes that the "arising from" prong has not been satisfied. But cab's argument overlooks that the operative facts regarding the formation and meaning of the LOU, a contract negotiated and executed by Tharo in Ohio, are substantially connected with cab's Ohio activities. Given this substantial connection, it matters not that the actual breach (the overcharge and the failure to provide the source codes) may have occurred in Germany in assessing the "arising from" prong of the due process analysis. *Cf. LAK, Inc.*, 885 F.2d at 1303 (commenting that if the contract at the center of the dispute had borne a more substantial relationship to the forum, it would not have been necessary for the activities giving rise to the breach to actually have occurred in the forum).

3. "Reasonableness." Though we "consider several factors . . . , including the burden on the defendant, the interest of the forum state, [and] the plaintiff's interest in

obtaining relief," *CompuServe*, 89 F.3d at 1268 (quotation omitted), in assessing the reasonableness of asserting personal jurisdiction over cab, where, as here, the first two prongs of the due process inquiry have been satisfied, we will "presume the specific assertion of personal jurisdiction was proper." *Cole*, 133 F.3d at 436 (citing *CompuServe*, 89 F.3d at 1268 and *First Nat'l Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982)); *see S. Mach.*, 401 F.2d at 384 ("[O]nce the first two questions have been answered affirmatively, resolution of the third involves merely ferreting out the unusual cases where that interest cannot be found.").

Nothing suggests this is one of those "unusual cases." Ohio has a strong interest in resolving a suit brought by an Ohio company for breach of a multimillion dollar business agreement. Likewise, Tharo has a strong interest in obtaining relief in Ohio. We acknowledge, as did the trial court, that the "unique burdens placed upon [international defendants] should [be given] significant weight in assessing the reasonableness of [exercising long-arm jurisdiction]." *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). But "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* cab's alien status alone is insufficient to persuade us that exercising jurisdiction is unreasonable, and nothing else cab points to overcomes the presumption that the exercise of jurisdiction was proper.

Because the exercise of personal jurisdiction over cab is authorized by Ohio law and in accordance with due process, we affirm the decision to deny cab's motion to dismiss.

B. Remittitur

The jury found that cab breached the LOU by failing to deliver "full information" to Tharo, including the "source codes" for certain printers covered by the LOU. At trial, Tharo's president, Thomas Thatcher, testified that the company would lose just over €5 million in profits because of this breach. As an alternative measure, Brlas, Tharo's expert accounting witness, testified that because of the breach--that is, without the information cab was required to provide--it would cost Tharo approximately €1.7 million more to develop the technology than if it had the information. The jury awarded over €5.7 million to Tharo on this claim.[2]

Post-verdict, cab filed a "Motion for Judgment as a Matter of Law, New Trial, or in the alternative, Remittitur." In requesting remittitur, cab pointed out that a court should order a remittitur if the jury's verdict is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905 (6th Cir. 2004) (quotation omitted). cab further stressed that remittitur is "particularly appropriate where damages estimates offered by a witness are too speculative to support a jury's damages award," and concluded by arguing that "the evidence does not support either of Tharo's alternative theories of damages on [the failure-to-provide-information claim]. . . . [T]his Court should reduce the damages by ordering a remittitur." As cab explained in its reply brief, "the trial court could have entered judgment in cab's favor on [this claim], granted a new trial,

---

[2] It is unclear how the jury arrived at this final amount--an amount that exceeds either of the two alternative measures submitted by Tharo.

or in the alternative, found that [the claim] was not supported by any damages and remitted [the award] to zero."

The magistrate judge agreed that Thatcher's lost profits testimony was too speculative to support the damages award with reasonable certainty and also agreed that the jury's award exceeded "the maximum that . . . could reasonably . . . be compensatory." Then, after noting there was "ample evidence of the developmental costs estimation of damages [as provided by Brlas's testimony]" the magistrate judge (conditionally) remitted Tharo's damages on the failure-to-provide-information claim to approximately €1.7 million, which Tharo accepted, cab now argues that after finding Thatcher's lost profits testimony too speculative to support the jury's award, "the trial court should have *ordered a new trial* on Tharo's . . . damages for developmental costs." (Emphasis added.) We find that the invited-error doctrine precludes cab's challenge.

Under the invited-error doctrine, "a party may not complain on appeal of errors that he himself invited or provoked the court . . . to commit." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 354 (6th Cir. 2002) (quotation omitted) (alteration in original). The magistrate judge granted cab's motion for remittitur; yet it is cab that "now cries foul on appeal," complaining that the case should have been remanded for a new trial on the damages issue. Because it was cab that presented the trial court with the option of granting the motion for remittitur as an alternative to ordering a new trial, cab cannot argue on appeal that the trial court erred by ordering a remittitur *in place of* a new trial, even if cab is not satisfied with the amount of the remittitur.

cab contends on appeal that because it asked the trial court to remit the damages award to zero and because it was

actually Tharo "that specifically invited the trial court to . . . remit the . . . judgment to [€1.7 million]," the invited-error doctrine is inapplicable. But given that cab assigns error to the magistrate judge's failure to order a new trial, it is irrelevant which party first suggested the €1.7 million figure, cab initially requested remittitur, and cab now argues the magistrate judge erred by ordering remittitur instead of a new trial. Under these circumstances, we find that the invited-error doctrine bars cab's appellate challenge.

C. Expert Testimony

cab next argues that the trial court failed to carry out its gatekeeping responsibilities and erroneously permitted Brlas to testify as an expert. In his testimony, Brlas opined on the amount of damages Tharo suffered from cab's breach. He estimated the amount cab overcharged Tharo, and he estimated the value to Tharo of the technological information that cab failed to provide.

We review de novo whether the trial court abdicated its gatekeeping role. *See Bureau v. State Farm Fire & Cas. Co.*, 129 Fed. Appx. 972, 975 (6th Cir. 2005) (citing *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) and *Goebel v. Denver & Rio Grande Western R.R.*, 215 F.3d 1083, 1087-88 (10th Cir. 2000)). But we review the trial court's decision to admit expert testimony under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), as well as any decisions regarding how to determine the admissibility of the evidence, for an abuse of discretion. *See Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 515 (6th Cir. 1998); *see also Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 248 (6th Cir. 2001) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).

Admissibility of expert testimony is governed primarily by Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert,* the Supreme Court provided guidance for the application of Rule 702, explaining that trial courts, as "gatekeepers," must determine

> whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93. Accordingly, a trial court must ensure an expert is qualified and that his proffered testimony is "not only relevant, but reliable." *Daubert,* 509 U.S. at 589 (footnote omitted).[3]

---

[3] The Supreme Court has held that "*Daubert*'s general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on . . . 'other specialized' knowledge." *Kumho Tire,* 526 U.S. at 141; *see also First Tennessee Bank Nat'l Ass'n v. Barreto,* 268 F.3d 319, 334-35 (6th Cir. 2001).

The trial court here fulfilled its gatekeeping role. In response to cab's motion to preclude Brlas's testimony, filed just six days before he was scheduled to testify, the magistrate judge (after allowing cab the opportunity to supplement its motion) reviewed the parties' briefing, held a *Daubert* hearing, and concluded:

> I've heard the arguments and we've had the evidentiary hearing in this case. It's my finding that Mr. Brlas is both qualified as an expert to testify on the matters for which he's offered, and that under the *Daubert* analysis and [*Kumho*] *Tire* analysis that his testimony is also relevant and reliable, and therefore, his testimony would be admissible. It seems to be that the arguments that have been made by [cab] go to the weight and credibility to be given to his testimony, not to the underlying issues of his qualifications and methodology. I find that the methodology he used is acceptable and is accepted in the field.

cab challenged this ruling in its post-verdict motion and the trial court reaffirmed its holding, explaining that

> Mr. Brlas has been a certified public accountant (CPA) since 1981 and is a partner at BBB [P]artners, where he specializes in financial analysis and business disputes. . . . This Court has no doubt that an expert opinion on the value of certain technology is relevant to the amount of damages resulting from failing to deliver [the requested information]. . . . Mr. Brlas utilized a methodology called "benchmarking" to estimate the cost to develop the technology at issue. . . . Mr. Brlas testified, without rebuttal, that benchmarking is recognized in his profession as a method to estimate cost and value; and he cited a cost

> accounting text book that referenced this methodology. Based on all the foregoing, this Court reaffirms its prior finding that Mr. Brlas's testimony was admissible under *Daubert*.

The trial court's analysis sufficiently establishes that it did not abdicate its gatekeeping role. *Cf. McGregor v. Paul Revere Life Ins. Co.*, 92 Fed. Appx. 412, 420 (9th Cir. 2004) ("While the trial judge's findings here were brief, they were sufficient to establish that she did not abdicate her gatekeeping role.").

Although cab argues that the trial court "merely [went] through the motions of having a hearing and briefing process," we cannot agree, cab cites cases holding that a trial court does not fulfill its gatekeeping responsibilities where it "fails to consider an essential *Daubert* factor, such as reliability," *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006), or where there is "not a single explicit statement on the record [indicating] that trial court conducted any form of *Daubert* analysis whatsoever," *Goebel*, 215 F.3d at 1088. But as explained above, that is not this case--nothing suggests that the trial court overlooked any of the *Daubert* factors.

We also reject cab's argument that the trial court abused its discretion in finding Brlas qualified to testify as an expert and in finding his testimony both reliable and relevant. A witness must qualify as "an expert by knowledge, skill, experience, training or education." Fed. R. Evid. 702. A witness is not "an expert simply because he claims to be." *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000) (quotation omitted). Brlas is a certified public accountant who has testified in nearly 100 trials and worked as an auditor at an international accounting firm. cab believes he is not an

expert because "[t]here is no evidence [he] is familiar with German accounting principles." Yet cab offers nothing to rebut Brlas's testimony that there are no material "differences between cab's German financial statement and [the] typical U.S. financial statements" he regularly encounters. Moreover, to the extent that Brlas "may have lacked familiarity with some aspects of [German accounting], . . . such unfamiliarity merely affected the weight and credibility of his testimony, not its admissibility." *First Tenn. Bank,* 268 F.3d at 333.

With respect to reliability, cab contends that because Brlas mistranslated a word in cab's financial statements, his overcharge claim-related testimony was not reliable. Under cab's translation, 80% of the salaries under the heading "Gehalter," should have been included in the production costs that Tharo was to pay cab. cab argues that Brlas's mistranslation caused him to exclude 100% of the salaries from his calculations, leading to an inflated damages estimate, cab does not, however, challenge the underlying method Brlas used to determine the amount of the overcharges. On cross-examination cab asked Brlas if his "production-related analysis" was too narrow, and Brlas admitted it was "possible" that he "pulled out" too many salaries. Additionally, cab's accountant testified that 80-85% of the "gehalter" salaries should have been included. Regardless of which translation is correct, the debate over whether to include these salaries is a fact question--one the jury resolved against cab--that does not render Brlas's testimony unreliable.

With respect to the failure-to-provide-information claim, cab again contends that Brlas did not qualify as an expert because he had "no technical expertise on the [research and] development of thermal transfer printers" and therefore "could not offer a reliable method for estimating development

costs." But cab does not challenge the magistrate judge's finding that Brlas, a CPA specializing in financial analysis and business disputes, was qualified "to opine on the value of technology," with or without "technical expertise" in the field of thermal transfer printers.

cab also challenges the reliability of Brlas's testimony relating to the failure-to-provide-information claim. Relying on cab's available financial documents, Brlas estimated the cost of developing the technology using the "benchmarking" method. The magistrate judge summarized benchmarking as: a "method that utilizes ratios to estimate cost or value in situations where incomplete historical data exists." Brlas testified that benchmarking is "a recognized method to determine things like cost and value," which requires "accountants to use their best judgment in coming up with estimates." cab attacks the result Brlas reached but fails to demonstrate the unreliability of Brlas's valuation. Moreover, though cab points out that Brlas admitted he had never before used benchmarking to estimate the value of technical information, cab does not argue that the method itself is unreliable, cab was free to, and did, rigorously cross-examine Brlas in an effort to cast doubt on his testimony. The verdict reflects that the jury credited Brlas's opinion. We find no abuse of discretion in admitting it.

Finally, cab argues that even if benchmarking could properly be used to determine its past developmental costs, it "had no relevance to the issue of correlating cab's past costs to Tharo's future costs." As the magistrate judge explained, however, benchmarking uses historical data (such as the cost of developing a product in the past) as a guide for estimating the cost of developing similar products in the present--the very purpose of using the method is to estimate present costs based on past costs. Brlas needed to estimate Tharo's

developmental costs because there was insufficient data to do anything more.[4]

For these reasons we find that the trial court did not abuse its discretion in admitting Brlas's testimony. Our conclusion obviates cab's request that "the panel *sua sponte* enter judgment in its favor" on both claims

D. Prejudgment Interest

Tharo moved to alter or amend the judgment, pursuant to Fed. R. Civ. P. 59, asking for prejudgment interest on its entire damages award. The magistrate judge awarded prejudgment interest, a decision we review for an abuse of discretion. *Clay v. Ford Motor Co.*, 215 F.3d 663, 672 (6th Cir. 2000). Whether the trial court had the authority to grant prejudgment interest, however, is a question of state law. *FDIC v. First Heights Bank, FSB*, 229 F.3d 528, 542 (6th Cir. 2000). Because we are sitting in diversity, we "must follow the controlling decisions of the Ohio Supreme Court" on questions of Ohio state law. *Henry v. Wausau Bus. Ins. Co.*, 351 F.3d 710, 713 (6th Cir. 2003) (citations omitted).

---

[4] cab also contends that Brlas could not determine cab's past development costs because he did not have all the necessary financial information. Tharo responds that to the extent Brlas relied on incomplete data it is because "cab did not retain any records of its [past] developmental costs." *Cf. Jahn v. Equine Servs., PSC*, 233 F.3d 382, 390 (6th Cir. 2000) ("Both experts noted that their analysis was hampered by the lack of records, . . . and it seems patently unfair to allow [the party seeking to exclude the experts testimony] to benefit from what seems to be a deplorable, and perhaps even negligent, absence of record-keeping."), cab fails to respond to Tharo's argument.

1. Prejudgment Interest on the Failure-to-Provide-Information Claim

Ohio Revised Code § 1343.03(A) governs a trial court's authority to award prejudgment interest on a breach of contract claim. It provides, in part, that a creditor is entitled to interest at the statutory rate "when money becomes due and payable upon any . . . instrument of writing, . . . and upon all judgments . . . for the payment of money arising out of . . . a contract." cab argues Tharo's claims fall outside the scope of the statute because no money is "due and payable" to Tharo under the terms of the contract. That is, as alleged in the complaint, the LOU required cab to furnish the requested information, which cab failed to do; but the LOU did not require cab to make any payments to Tharo. Ohio law, however, does not support cab's position.

In *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St. 3d 110, 1995 Ohio 131, 652 N.E.2d 687 (Ohio 1995), the Supreme Court of Ohio found that The Ohio State University breached a construction contract. The court held that "to make the aggrieved party whole, the party should be compensated for the lapse of time between accrual of the claim and judgment." *Id.* at 692. Thus, "in a case involving a breach of contract where liability is determined and damages are awarded . . . , the aggrieved party is entitled to prejudgment interest." *Id.*

Relying on this reasoning, Ohio courts (and this court) have held that the "language [of Ohio Rev. Code § 1343.03(A)] is not permissive nor ambiguous," *Dwyer Elec. v. Confederated Builders*, No. 3-98-18, 1998 Ohio App. LEXIS 5490, at *8 (Ohio Ct. App. Oct. 29, 1998)—"once a party has a judgment for an underlying contract claim . . . he is entitled to judgment as a matter of law." *Id.*, 1998 Ohio

App. LEXIS, at *5; *see also Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 693 (6th Cir. 2000) (noting, in summarizing Ohio-prejudgment interest law, that "[i]f a favorable judgment award has been obtained by plaintiff, plaintiff has a right under [Ohio Rev. Code §] 1343.03(A) to an interest award as a matter of law, and the trial judge has no discretion not to grant any interest award"); *Local Mktg. Corp. v. Prudential Ins. Co. of Am.*, 159 Ohio App. 3d 410, 2004 Ohio 7001, 824 N.E.2d 122, 126 (Ohio Ct. App. 2004) (rejecting an argument similar to cab's as "ignor[ing] the statutory language that says that interest is appropriate under a judgment arising out of a contract"); *Dayton Sec. Assocs. v. Avutu,* 105 Ohio App. 3d 559, 664 N.E.2d 954, 959 (Ohio Ct. App. 1995) ("[Section] 1343.03(A) reposes no discretion in the trial court. . . . When the liability issue was determined in the Plaintiffs' favor, they were then entitled to prejudgment interest pursuant to the statute.").

cab points the court to a recent Ohio appellate court decision, *RPM, Inc. v. Oatey Co.*, 2005 Ohio 1280, 2005 Ohio App. LEXIS 1251 (Ohio Ct. App. Mar. 23, 2005), in which the court declined to award prejudgment interest for breach of a confidentiality agreement, holding that by the "explicit terms of [the statute], prejudgment interest is limited to those contracts that provide for a payment of money that the breaching party failed to pay." *Id.*, 2005 Ohio 1280, P63-P64, 2005 Ohio App. LEXIS 1251 at *38. *RPM* distinguished *Royal Electric* on the ground that in that case there was no question that "there was in fact money owed under the . . . terms of [the] contract"; rather, the "sole dispute" was over "whether [the plaintiff] was entitled to . . . prejudgment interest . . . despite the fact that the amount of the debt was . . . not reasonably capable of ascertainment." *Id.*, 2005 Ohio 1280, P65-P68, 2005 Ohio App. LEXIS 1251 at *39-*40.

But as the dissent commented (and as the weight of the authority suggests), "the net effect of the *Royal Electric* ruling is that prejudgment interest is appropriate in contract claims. . . . Because of what was verbalized in [the contract], money became due and payable when [the defendant] did what it did." *Id.*, 2005 Ohio 1280, P70-P71, 2005 Ohio App. LEXIS 1251 at *43-*44. That is, money damages become due and payable on a contract at the time of the breach.

Alternatively, cab argues that "Tharo is still not entitled to . . . prejudgment interest on the development costs because that money has never actually been spent." But whether Tharo spent the money to develop the technology matters not because, as Tharo explains, the €1.7 million damages award represented the cost to recoup the property the contract promised but cab wrongfully withheld from Tharo as of the date of the breach. Because Tharo presented evidence of its development costs as a proxy for future lost profits, cab argues that "Tharo itself recognized development costs are future damages." But cab offers nothing to suggest that Tharo's estimates did not represent the present value of the breach, nor did it offer any such suggestion at trial.

We discern no abuse of discretion and affirm the decision to award prejudgment interest on the failure-to-provide-information claim damages.

2. Prejudgment Interest the Overcharge Claim

The jury found that cab breached the LOU by overcharging Tharo and awarded Tharo just over €1 million in damages. In addition to re-asserting its "no-money-due-and-payable" argument against allowing prejudgment interest, cab also argues that Tharo is not entitled to prejudgment interest because "Tharo did not lose the value of its money."

cab contends that the overcharge damages were merely meant to allow Tharo to recover the overpayments it made to cab. The Supreme Court of Ohio, however, has squarely rejected this argument. *See Miller v. Gunckle,* 96 Ohio St. 3d 359, 2002 Ohio 4932, 775 N.E.2d 475, 480-81 (Ohio 2002) ("[I]nterest is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain made from its use by the debtor." (quotation omitted)). Tharo had no responsibility to explain what it would have done with the money had it not wrongfully overpaid cab.

Accordingly, we affirm the decision to award prejudgment interest. But inasmuch as the parties agree that the magistrate judge used an incorrect date in determining when prejudgment interest stopped accruing on the overcharge claim, we remand the case for the limited purpose of determining the correct end date and recalculating the *amount* of prejudgment interest Tharo is entitled to on this claim.

E. Present-Value Instruction

cab contends that the trial court erred by not instructing the jury to reduce Tharo's damages on the failure-to-provide-information claim to present value, cab failed to object to the lack of the instruction at trial, thus we review only for plain error. *See Preferred RX v. Am. Prescription Plan,* 46 F.3d 535, 548 (6th Cir. 1995); Fed. R. Civ. P. 51(d)(2).

"Under the common law of Ohio, future damages must be reduced to present value, and a defendant is entitled to a jury instruction to that effect." *Galayda v. Lake Hosp. Sys.*, 71 Ohio St. 3d 421, 1994 Ohio 64, 644 N.E.2d 298, 301 (Ohio 1994). But, as we discuss above, the damages on the failure-to-provide-information claim represent "the value of the

information cab was required to turn over to Tharo" on the date of the breach, and at trial cab failed to challenge the accuracy of €1.7 million estimate. Nevertheless, cab asks this court to speculate that Brlas's estimate did not reflect the value at the time of the breach and to conclude that the trial court plainly erred by not instructing the jury to reduce its damages award accordingly. We decline to engage in such speculation.[5]

F. Parol Evidence

Post-trial, the magistrate judge denied cab's Fed. R. Civ. P. 50(b) for judgment as a matter of law on the failure-to-provide-information claim. On appeal, cab argues that the LOU's unambiguous terms mandated judgment as a matter of law in its favor, and the trial court improperly allowed parol evidence. Assuming the trial court erroneously admitted the disputed evidence, we nonetheless affirm the trial court's denial of cab's 50(b) motion because cab failed to renew its motion for judgment as a matter of law at the close of all evidence.

"'It is well-settled that a court can . . . consider a [post-trial] motion for a [judgment as a matter of law] *only if* the moving party has previously made a motion for [judgment as a matter of law] at the close of all the evidence." *United*

---

[5] In the order denying cab's post-judgment motions, the magistrate judge noted that "[i]f Tharo chooses to go forward with a new trial [on damages], Tharo must come forward with evidence of present value." This does not, however, affect our analysis. If Tharo had been required at trial to come forward with "evidence of present value," presumably it would have explained, as it does now, that the evidence presented at trial already estimated the present value of the breach.

States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428, 447-48 (6th Cir. 2005) (quoting *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1522 (6th Cir. 1990)) (footnote omitted), cab moved for judgment as a matter of law at the conclusion of the Tharo's case but failed to renew its motion at the close of all evidence. Although "technical deviation from [this procedural] command is not fatal," *Medshares Mgmt.*, 400 F.3d at 448 (quotation omitted), cab makes no argument that an exception applies. *See id.* (listing exceptions to the rule). We affirm the denial of the motion.[6]

III.

For these reasons, the court remands the case to allow the magistrate judge to determine the date prejudgment interest stopped accruing on the overcharge claim. Accordingly, the court also remands the case to properly recalculate the amount of prejudgment interest Tharo is entitled to on the overcharge claim. We affirm the trial court in all other respects.

---

[6] Though the magistrate judge denied cab's motion on the merits, we may affirm that decision "if correct for any reason, including one not considered below." *Hoge v. Honda of Am. Mfg.*, 384 F.3d 238 (6th Cir. 2004) (quotation omitted).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO: 1:03CV419

[Filed June 1, 2005]

THARO SYSTEMS INC.,	)
Plaintiff,	)
	)
v.	)
	)
CAB PRODUKTTECHNIK,	)
Defendant.	)
	)

MAGISTRATE JUDGE VECCHIARELLI

JUDGMENT ENTRY

Judgment is entered in favor of the Plaintiff and against the Defendant as follows:

1. On Count Two in the principal amount of one million, sixty-six thousand, three hundred forty Euros and sixty-five cents (€ 1,066,340.65), plus prejudgment interest in the amount of four hundred fifty-three thousand, twenty-two Euros (€ 453,022.00), plus post-judgment interest at the rate

established in 28 U.S.C. § 1961(a) on the principal sum from and after the date hereof.

2. On Count Three in the principal amount of one million, seven hundred sixty-eight thousand, fifty-seven Euros (€ 1,768,057.00), plus prejudgment interest in the amount of two hundred sixty-two thousand, six hundred sixty-six Euros (€ 262,666.00), plus post-judgment interest at the rate established in 28 U.S.C. § 1961 (a) on the principal sum from and after the date hereafter.

3. Plaintiff is awarded costs in the amount of $39,468.39.

IT IS SO ORDERED.

/s/Nancy A. Vecciarelli
U.S. Magistrate Judge

DATE: June 1, 2005

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO: 1:03 CV 0419

[Filed October 16, 2003]

THARO SYSTEMS, INC.,)
Plaintiff,)
)
v.)
)
CAB PRODUKTTECHNIK,)
Defendant.)
)

MAGISTRATE JUDGE VECCHIARELLI

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

On January 2, 2003, Tharo Systems, Inc. ("Tharo") filed a three count Complaint in the Ohio Court of Common Pleas for Medina County against Defendant cab Produkttechnik GMBH & Co. KG ("cab"), alleging breach of contract. On March 7, 2003, cab removed the case from Common Pleas

Court to this Court. (Doc. No. 1.) Cab filed its Answer to Complaint Instanter on April 16, 2003 (Doc. No. 7), and Tharo filed its First Amended Complaint on September 11, 2003, alleging the additional claims of promissory estoppel and unjust enrichment. (Doc. No. 34.) cab filed an Answer to First Amended Complaint on September 25, 2003. (Doc. No. 36.)

On September 3, 2003, cab filed a Motion to Dismiss for Lack of Personal Jurisdiction ("Motion to Dismiss") and a Brief in Support with an Exhibit (Doc. No. 32.) Tharo filed a Brief in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction ("Plaintiff's Brief') with Exhibits on September 19, 2003. (Doc. No. 35.) On October 3, 2003, cab filed a Reply Brief. (Doc. No. 37.) This case is before the undersigned United States Magistrate Judge pursuant to the consent of the parties entered under the authority of 28 U.S.C. § 636(c)(2).

I. Factual Background

The following background is taken from the pleadings, sworn declarations, and sworn papers submitted on behalf of the parties, as considered in a light most favorable to Tharo.

This action arises out of the demise of a lengthy business relationship between Tharo and cab that began in 1988 and ultimately resulted in a Letter of Understanding ("LOU"). Tharo is an Ohio corporation, licensed to do business in the State of Ohio, and located in Brunswick, Ohio. Tharo is in the business of developing bar code label printing software and selling and servicing thermal transfer printers and label applicators, cab is a German corporation located in Karlsruhe, Germany, and is not authorized to do business in Ohio. cab

is engaged in the business of manufacturing thermal transfer printers and label applicators.

The relationship between Tharo and cab is best summarized by breaking it into two general time periods: the pre-LOU period and the LOU period. The pre-LOU period began in late 1987 when Thomas M. Thatcher ("Thatcher"), President of Tharo, and Uwe Ludemann ("Ludemann"), Sales Manager for cab, met at a London, England product exhibition. The parties did not meet again until 1988; cab eventually became a customer of Tharo as a European distributor of Tharo's Easybell software.

Looking to further the business relationship, Tharo and cab attempted to form a joint venture designed to manufacture and market thermal printers worldwide. The negotiations focused on Thatcher becoming an investor in a printer manufacturing facility for both cab and Tharo in Sommerda, Germany. Over one-hundred faxes were exchanged regarding the joint venture. The negotiations culminated in September 1994 with a proposed contract outlining the joint venture and a visit to Tharo from Klaus Bardutzky, cab's president, and Ludemann. Ultimately the joint venture proposals failed; however, the relationship between Tharo and cab did not.

In December of 1994, the LOU period began with renewed negotiations to establish a collaborative relationship between Tharo and cab. The negotiations entailed numerous phone calls, e-mails, and faxes, and also included two visits to the United States by cab executives: Thatcher met with Ludemann in Florida in April 1995 and again in April 1996 at Tharo in Ohio to finalize the LOU.

During this negotiation process, Tharo and cab continued to work together to improve their products. Tharo developed

software to render cab's printers compatible with bar code labeling programs, including Tharo's own Easylabel program. Thatcher estimates a minimum of one-thousand hours of programming were spent by Tharo employees on this project. The parties also developed the idea of the Gemini printer, the first thermal transfer printer designed to be run with popular Windows programs.

The negotiation process culminated with the drafting and ultimate signing of the LOU. Ludemann drafted the LOU in Germany and brought it to Tharo in April 1996. On May 1, 1996, Tharo executed the LOU in Ohio, and Tharo's and cab's business relationship was finally memorialized. The LOU set forth many details regarding the roles of the two parties and referred to Tharo and cab as the "CTC partnership." The CTC partners included cab's affiliate in Sommerda, Germany, Tharo, and cab's operation in Karlsruhe, Germany. The general goal of the relationship was to facilitate the planning, construction, manufacturing, and worldwide distribution of the parties' products in the field of label printing systems.

After the parties executed the LOU, Tharo continued to devote man-hours and resources to enhancing the label printers that were the subject of the LOU. From its Brunswick, Ohio headquarters, Tharo developed software to render cab's printers compatible with various Windows operating systems, created programming manuals, and translated operator's manuals into English. Cab distributed these Tharo-developed products and "posted" them to its web-site. Many other technical tasks were accomplished at cab's request by Tharo employees in Brunswick, Ohio. To coordinate these tasks, Tharo and cab employees communicated, according to Thatcher, on a daily basis. From 1998 to 2002, Tharo also expended an estimated 1.4 million

dollars in promotions and marketing of the printers that were subject to the LOU.

During the LOU period, cab employees and executives occasionally visited the United States, including Tharo headquarters in Brunswick, Ohio. On two occasions in the spring of 1998, cab employees met with Tharo officials at Tharo. Tharo welcomed cab officials again in February 2001 for meetings. Tharo and cab employees also had contacts at a conference in Florida in 1999, and at various trade shows in Chicago in 1997, 1999, 2000, and 2001. At the trade shows, cab employees often bore the Tharo name upon their garb.

Pursuant to the LOU, Tharo purchased approximately six million dollars worth of printers, parts, and accessories from cab. A majority of these products were shipped to Tharo's headquarters in Brunswick, Ohio. Thatcher also negotiated a license agreement with a third party on behalf of cab that resulted in significant economic benefits to both Tharo and cab.

The Tharo-cab relationship as outlined in the LOU continued unscathed until late October 2002. Upon learning that cab intended to set up networks in America and Asia to distribute thermal printers, Tharo submitted a notice of cancellation on October 30, 2002. Pursuant to the cancellation provision of the LOU, the LOU relationship was terminated.

II. Standard of Review

When a motion to dismiss for lack of personal jurisdiction is made, the plaintiff has the burden of establishing that jurisdiction exists. *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168 (6th Cir. 1988). The burden the plaintiff

must meet depends on whether the district court will hold a preliminary evidentiary hearing before deciding the motion. *Id.* If the district court opts to decide the motion to dismiss without an evidentiary hearing, the plaintiff need only set forth a *prima facie* case of jurisdiction. *Id.* at 1169 (quoting *Welsh v. Gibbs*, 631 F.2d 436, 438-39 (6th Cir. 1980)). In making a personal jurisdiction determination, the court must consider the pleadings and affidavits in a light most favorable to the plaintiff. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). The court must not weigh the controverting assertions of the party seeking dismissal. *Id.* "Dismissal in this procedural posture is proper only if *all* the specific facts which the plaintiff alleges collectively fail to state a prima facie case for jurisdiction." *Id.* Because cab's motion is being decided without an evidentiary hearing, Tharo need only establish a *prima facie* case of jurisdiction to overcome cab's Motion to Dismiss.

III. Analysis

"In diversity cases, federal courts apply the law of the forum state to determine whether personal jurisdiction exists." *Nationwide Mutual Insurance Co. v. Tryg International Insurance Co., Ltd.*, 91 F.3d 790, 793 (6th Cir. 1996) (citing *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1298 (6th Cir. 1989)). A state may not exercise personal jurisdiction over a potential nonresident defendant unless two requirements are satisfied: (1) jurisdiction must be appropriate under the state's long arm statute, and (2) jurisdiction must comport with the requirements of due process. *See Nationwide Mutual Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1993); *Matrix Essentials, Inc. v. Harmon Stores, Inc.*, 205 F. Supp. 2d 779, 784-85 (N.D. Ohio 2001).

A. Personal Jurisdiction Under Ohio's Long Arm Statute

Tharo's claim of personal jurisdiction over cab is based on the following provisions of Ohio's long arm statute:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
> (1) Transacting any business in this state;
> (2) Contracting to supply services or goods in this state;...

Ohio Rev. Code § 2307.382. The phrase "transacting any business" has been interpreted very broadly by Ohio courts. *See, e.g., Kentucky Oak Malls Co. v. Mitchell's Formal Wear. Inc.*, 53 Ohio St.3d 73, 75 (Ohio 1990); *Hammil Mfg. Co. v. Quality Rubber Prods., Inc.*, 82 Ohio App.3d 369, 374 (Ohio App. 1992). Transact "'means to prosecute negotiations; to carry on business; to have dealings...The word embraces in its meaning the carrying on or prosecution of business negotiations but it is a broader term than the word 'contact' and may involve business negotiations which have either wholly or partly brought to a conclusion.'" *Kentucky Oak Malls Co.*, 53 Ohio St.3d at 75 (quoting *Blacks Law Dictionary* 1341 (5th ed. 1979)). The court must rely on a case-by-case determination to establish whether a defendant has transacted business in Ohio. *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.*, 68 Ohio St. 3d 181,185 (Ohio 1994).

Here, cab had negotiated and dealt with Tharo for approximately fifteen years before the cancellation of the LOU. The negotiations and dealings included numerous communications via telephone and e-mail, in-person meetings in Ohio, requests from cab to Tharo for specific services, and

the sale of millions of dollars worth of printers and related products from cab to Tharo. Thus, through cab's lengthy business relationship and its many negotiations and dealings with an Ohio corporation, it has transacted business in Ohio within the meaning of the long arm statute. *See Norcold, Inc. v. Greg Lund Products, Ltd.*, 109 F. Supp. 2d 819, 823 n. 4 (S.D. Ohio 2000). As the LOU was the basis of cab's transactions in Ohio, and Tharo's claims are for breach of the LOU, the cause of action herein arises from cab's transactions in Ohio. Hence, the long arm statute is satisfied under Ohio Rev. Code 2307.382(A)(1).[1]

B. Personal Jurisdiction Under the Due Process Clause

Once a court finds that the state's long-arm statute provides jurisdiction over a non-resident defendant, it must consider whether the exercise of such jurisdiction is within the strictures of the Due Process Clause of the Fourteenth Amendment. The central constitutional inquiry is whether the defendant has certain minimum contacts with Ohio "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). Recognizing the imprecise nature of such a standard, the Sixth Circuit has set forth a three-part test as a guide to lower courts in making personal jurisdiction determinations: (1) a defendant must purposefully avail itself of the privilege of acting in the forum state; (2) the cause of action must arise from the defendant's activities in the forum

---

[1] As this Court finds long arm jurisdiction under § 2307.382(A)(1), it is unnecessary to analyze long arm jurisdiction under Tharo's other alleged basis for jurisdiction, § 2307.382(A)(2).

state; and (3) the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *LAK, Inc.*, 885 F.2d at 1299 (quoting *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)).

1. Purposeful Availment

The "purposeful availment" prong of the *Southern Machine* test dictates that a defendant may be haled into a jurisdiction only if that defendant has "the kind of substantial relationship with the forum state that invokes, by design, 'the benefits and protections of its laws.'" *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1300 (6th Cir. 1989). "A mere collateral relation to the forum State" based on "random," "fortuitous," or "attenuated" contacts will not establish purposeful availment on the defendant's part. *Id.* However, "where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum," the defendant satisfies the purposeful availment requirement. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985) (internal citations omitted).

This Court finds instructive the Supreme Court's decision in *Burger King* and the Sixth Circuit's decision in *Compuserve*. *Burger King* involved a Michigan resident who entered into a twenty year franchise agreement with Burger King Corp., a Florida corporation, to operate a franchise in Detroit, Michigan. A dispute under the agreement arose, and Burger King brought an action in the United States District Court for the District of Florida. In analyzing the constitutionality of jurisdiction over the defendant in Florida, the Court noted that a contract with a non-resident party cannot alone establish purposeful availment. *Burger King*,

471 U.S. at 478. Instead of relying solely on the existence of the contract, courts must consider prior negotiations, contemplated future consequences, the terms of the contract, and the parties' actual course of dealing. *Id.* at 479. Furthermore, "territorial presence... will enhance a potential defendant's affiliation with a State[.]" *Id.* at 476.

The defendant in *Burger King* had no offices in Florida, nor did he ever visit the state. *Id.* at 479. Yet, the Court found that the franchise agreement "had a substantial connection" with Florida in part because of the defendant's deliberate negotiations with a Florida corporation to enter a long term affiliation. *Id.* Furthermore, the defendant voluntarily agreed to a franchise agreement that "envisioned continuing and wide-reaching contacts with Burger King in Florida." *Id.* The Court also gave weight to the fact that the defendant knew he was affiliating with an entity based in Florida, and that after the agreement was formed, the parties carried on "a continuous source of direct communications by mail and telephone." *Id.* at 480-81.

Compuserve involved a Texas resident who entered into a business relationship with Compuserve, a computer information service headquartered in Columbus, Ohio, which allows subscribers to access computing and information services via the Internet. *Compuserve*, 89 F.3d at 1260. The defendant subscribed to Compuserve's system and eventually entered into a further agreement creating an independent contractor relationship, whereby the defendant could place his software on Compuserve's system to enable purchases by third party subscriber's to Compuserve. *Id.* The defendant eventually accused Compuserve of copyright infringement and unfair competition. *Id.* at 1261. Compuserve then brought an action for declaratory judgment against the defendant in the

United States District Court for the Southern District of Ohio. *Id.*

Although the defendant had never visited Ohio, the Sixth Circuit found that personal jurisdiction existed because he "knowingly made an effort - and, in fact, purposefully contracted - to market a product in other states, with Ohio-based Compuserve operating, in effect, as his distribution center." *Compuserve*, 89 F.3d at 1263. Supporting a finding of purposeful availment, the court noted, among other things, that the defendant himself sought out Compuserve, entered an agreement with Compuserve with the knowledge it was an Ohio-based company, and sent software to the Compuserve system in Ohio for others to use, and perhaps, purchase. *Id.* at 1264. The court also gave weight to the fact that the defendant "purposefully perpetuated the relationship with Compuserve via repealed communications with its system in Ohio." *Id.* Moreover, the defendant created an ongoing relationship; it was not a "one-shot affair." *Id.* (quoting *Southern Machine*, 401 F.2d at 385).

As the quality and quantity of the contacts with Ohio by cab are akin to those of the defendants' in *Burger King* and *Compuserve*, this case falls well within the holdings of those decisions. Beginning in 1988 and through 1996, when the LOU was executed, cab was engaged in frequent business negotiations and dealings with Tharo. cab directed numerous telephone calls, e-mails, and faxes to Tharo in an attempt to formalize and further a business relationship. Moreover, cab executives visited Tharo headquarters to finalize the LOU in April of 1996. Not only did the LOU *envision* a continuing and longstanding business relationship between Tharo and cab, such a relationship actually materialized for nearly seven years. After the LOU was executed, cab and Tharo communicated on a near daily basis, with many technical

tasks being accomplished by Tharo at cab's request, cab employees and executives met at Tharo in 1998 and 2001 for business meetings pursuant to the LOU. Finally, a series of distributions and purchases between the parties occurred through cab's shipment of printers to Tharo at Tharo headquarters, and cab's distribution of software and manuals produced at Tharo headquarters.

All of these facts make clear that cab "consciously reached out from [Germany] to Ohio" to create an ongoing business relationship to further the profitability of its products, namely printers and related products. *See Compuserve*, 89 F.3d at 1266; *Cole v. Mileti*, 133 F.3d 433, 436 (6th Cir. 1998) (where a nonresident defendant transacts business by negotiating and executing a contract via telephone calls and letters to an Ohio resident, the defendant has purposefully availed himself of the forum by creating a continuing obligation in Ohio); *see also In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 228, 235 (6th Cir. 1972).

In arguing that it has not purposefully availed itself to Ohio, cab relies chiefly on *Calphalon v. Rowlette*, 228 F.3d 718 (6th Cir. 2000).[2] *Calphalon* involved a Minnesota

---

[2] In its Reply Brief at 4-5, cab cites the additional cases of *Nationwide Mutual Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790 (6th Cir. 1996) and *LAK, Inc.* in support of the proposition that activities undertaken by Tharo in Ohio cannot support a finding that cab purposefully availed itself to Ohio. While Tharo does place much emphasis on its activities in Ohio, this Court places limited reliance on such facts in finding jurisdiction over cab. Tharo's actions in Ohio are considered only to the extent that such actions demonstrate an ongoing business relationship between the parties (as opposed to a one-shot deal), which is an important factor in a

corporation (defendant), which was the exclusive manufacturer's representative for Calphalon, a corporation with its principal place of business in Ohio. From 1980 to 1996 a "letter agreement" controlled the relationship. *Id.* at 720. In 1996 and 1997, the defendant executed one-year representative agreements. *Id.* When defendant notified Calphalon of its claims for breach of contract, Calphalon won the race to the courthouse and filed a declaratory action in the District Court for the Northern District of Ohio. This Court finds that the quality of the contacts in Ohio by cab are greater than those in *Calphalon*, and therefore, significant distinguishing features between the two cases exist. *See Steelcase, Inc. v. Mar-Mol Co., Inc.*, 210 F. Supp. 2d 920, 930-32 (W.D. Mich. 2002) (similar to the instant case and also distinguishing *Calphalon*).

First, it is evident here that cab reached out to Tharo. After the initial London meeting in 1987, cab visited Tharo headquarters on a few occasions, and furthermore, actively sought to strengthen and mature the business relationship between the two corporations. By contrast in *Calphalon*, there is no mention of any reaching out by the defendant towards Calphalon.

Second, and most importantly, the defendant's role in *Calphalon* was essentially a mere conduit for Calphalon's business. *Id.* at 930. Here, there was a concrete buyer-seller relationship between cab and Tharo where millions of dollars worth of goods were shipped into Ohio at Tharo's

---

finding of purposeful availment. Furthermore, as the foregoing discussion demonstrates, cab's own actions directed towards Ohio are of a far greater quality than those by the defendants in *Nationwide* and *LAK, Inc.*

headquarters. Further, software and manuals produced at Tharo were distributed by cab. Each shipment to or from Tharo constituted a separate instance of reaching out to Ohio. Thus, *Calphalon* is distinguishable from the case at bar.

Finally, cab asserts its contacts with Ohio occurred merely because Tharo is located there, and it therefore could not have purposefully availed itself to Ohio. This misses the crux of the purposeful availment test. By requiring purposeful availment, the Supreme Court has established an objective measure of when a party should "reasonably anticipate" out-of-state litigation. *See Burger King*, 471 U.S. at 475 (citing *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 295 (1980)); *see also Southern Machine*, 401 F.2d at 382-83. Thus, whether cab engaged Tharo *because of* Tharo's location in Ohio is not central to the inquiry. (Surely, the defendant in *Burger King* did not seek a Burger King franchise for the reason that the franchisor's corporate headquarters were located in Florida). More important is the fact that cab purposefully, directly, and knowingly sought out and nurtured a business relationship with an Ohio resident for the better part of fifteen years. Thus, cab purposely availed itself to Ohio and should have reasonably anticipated being haled into court within its jurisdiction.

2. *The Cause of Action Must Arise From Defendant's Activities in Ohio*

The second prong of the Due Process analysis requires that the cause of action arise from the defendant's activities in the forum state. *Southern Machine*, 401 F.2d at 381. "If the defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts." *Compuserve*, 89

F.3d at 1267 (citing *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994).

Tharo has alleged breach of contract, unjust enrichment, and promissory estoppel. Specifically, cab allegedly breached the LOU for: selling products in Tharo's exclusive territory, charging Tharo higher prices than those to which Tharo is entitled, failing to deliver required product information, and refusing to sell Tharo various models of printers. (Plaintiff's Brief at 11-12.) cab argues that the activities giving rise to Tharo's cause of action occurred outside Ohio. (Defendant's Brief at 9.)

However, cab's assertion overlooks long-standing Sixth Circuit precedent stating that "if the cause of action is for breach of contract, as it is here, then the cause of action naturally arises from the defendant's activities in Ohio." *Cole*, 133 F.3d at 436. Further, "defendant's transaction of business in Ohio - its entering of a contractual relationship with an Ohio corporation - is necessarily the very soil from which the action for breach grew." *In-Flight*, 466 F.2d at 229. In light of the nature of this case and Sixth Circuit precedent, the second prong of the *Southern Machine* test is satisfied.[3]

---

[3] In its Reply Brief at 10, cab cites *Healthcare Capital, L.L.C. v. Healthmed, Inc.*, 213 F. Supp.2d 850 (S.D. Ohio 2002) and *LAK. Inc.* as support for its argument that Tharo's cause of action did not arise out of cab's actions in Ohio. However, as cab itself notes, *Healthcare Capital* did not involve a breach of contract claim; therefore its failure to rely on the rules of *Cole* and *In-Flight* is understandable. Further, in finding that the plaintiff's claims did not arise out of the defendant's contacts in the forum state, the *LAK, Inc.* court conceded that if the contract at issue "had borne a more substantial relationship to [the forum state], it would not have been necessary for the" actions giving rise to the breach of contract

3. Reasonableness

The last hurdle to establishing personal jurisdiction requires that the acts or consequences caused by the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable. *Southern Machine*, 401 F.2d at 381. Once the first two prongs of the *Southern Machine* test are satisfied, as they are here, a court will presume that the third prong is satisfied. *See Cole,* 133 F.3d at 436; *Compuserve*, 89 F.3d at 1268 (if the first two elements of a prima facie case are met, an inference arises that the third factor is also present; *see also Southern Machine*, 410 F.2d at 384 (once the first two questions have been answered affirmatively, resolution of the third element involves merely ferreting out the unusual cases where the forum state has no interest. Further, in order to succeed under the third prong, a defendant must make a "compelling case" that other considerations would render personal jurisdiction unreasonable. *Steelcase,* 210 F. Supp. 2d at 935 (quoting *Burger King*, 471 U.S. at 477).

Regarding Ohio's interest in litigating this case, this Court finds that Ohio has a strong interest in resolving a suit brought by an Ohio company for breach of a multimillion dollar business arrangement. *See Compuserve*, 89 F.3d at 1268; *Southern Machine*, 401 F.2d at 385 (when a contract is with a resident of the forum state, the state's interest in resolving the suit based on the contract and brought by the resident cannot be doubted). Moreover, cab's acts and consequences

---

to have actually occurred in the forum state. *LAK, Inc.*, 885 F.2d at 1303. Here, as the foregoing discussion demonstrates, a substantial enough relationship exists between the contract at issue and Ohio so as to make unnecessary a showing that the actions giving rise to the breach actually occurred in Ohio.

have a substantial enough connection to Ohio to render jurisdiction reasonable.[4] Upon entering the LOU, cab apparently foresaw a lengthy and prosperous relationship with an Ohio corporation. Also, Tharo's own performance under the LOU in Ohio demonstrates a substantial connection between the consequences of the alleged breach and the forum state. *See Calphalon*, 228 F.3d at 724 (stating that consequences of the breach were not substantially connected to the forum state in part because the party alleging breach did not perform under the agreement in the forum state), cab cannot now attempt to avoid process from Ohio courts. *See id.*; *Compuserve*, 89 F.3d at 1268.

cab's final attempt to avoid jurisdiction in Ohio is based on the international nature of its relationship with Tharo. (Defendant's Brief at 12-13.) In *Asahi Metals Industry Co, Ltd., v. Superior Court of California*, 480 U.S. 102, 114 (1987), the Supreme Court stated that the unique burdens of international defendants should have significant weight in assessing the reasonableness of long-arm jurisdiction. Nevertheless, when minimum contacts have been established, the interests of the plaintiff will often justify "the serious

---

[4] cab cites *Int'l Technologies Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386 (6th Cir. 1997) in its Reply Brief at 11-12 to support its proposition that it did not have a "substantial enough connection" with Ohio to satisfy the third prong of the *Southern Machine* test. However, unlike the case at bar, *Int'l Technologies* involved a dispute that turned on the interpretation of an agreement that by its express terms reserved jurisdiction and choice of law with the defendant's situs in Switzerland. *Id.* at 393-94, 396. This fact was important to the Sixth Circuit in affirming a finding of no personal jurisdiction over the Swiss defendant. *Id.* Because the LOU contains no jurisdiction or choice of law provisions, this Court finds *Int'l Technologies* distinguishable and unpersuasive.

burdens placed on the alien defendant." *Id.*

Here, as discussed above, cab has established significant contacts with Ohio via its long term, multimillion dollar relationship with Tharo. Moreover, cab has not articulated sufficiently "unique burdens" that would preclude extending the long-arm of Ohio courts over cab. cab asserts that important individuals and documents are located in Germany. (Defendant's Brief at 12-13.) However, the mere location of relevant evidence in Germany is not enough to overcome the presumption of reasonableness. Accordingly, Tharo has satisfied the third prong of the *Southern Machine* test.

IV. Conclusion

For the reasons set forth above, the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED. This Court makes no findings and renders no opinion regarding the merits of this case.

IT IS SO ORDERED.

/s/ _____
Nancy A. Vecciarelli
U.S. Magistrate Judge

Date: October 16, 2003